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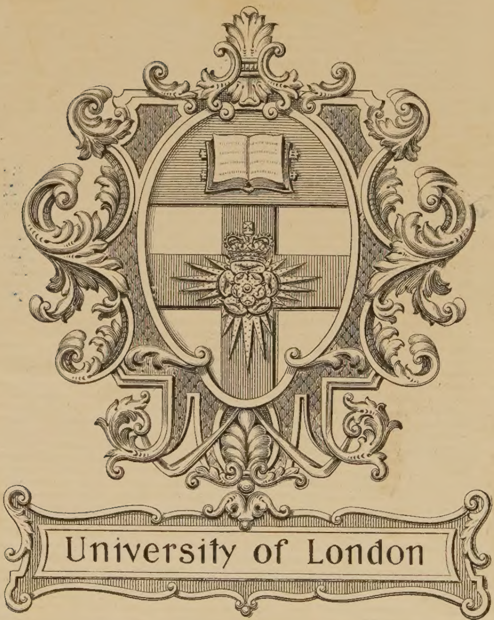
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ABBREVIATIONS.

Aff. affirmed.
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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1885

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1906

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1911

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1927

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1936

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1937

Local Government Superannuation Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 68), *s.* 8, *sub-s.* 1; *s.* 35. WALTER *v.* ETON R.D.C. - **Lord Goddard C.J. 583**

1938

Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 26), *s.* 5. RICE *v.* CAPITAL & PROVINCIAL PROPERTY TRUST, LD. - - - **C. A. 481**

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1939

Rent and Mortgage Interest (*Restrictions*) *Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-ss.* 1 *and* 3. WHITTY *v.* SCOTT-RUSSELL - - - **C. A. 32**

—— —— *s.* 7, *sub-s.* 2. RICE *v.* CAPITAL & PROVINCIAL PROPERTY TRUST, LD. **C. A. 481**

Local Government Staffs (*War Service*) *Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 94). TURBURVILLE *v.* WEST HAM CORPORATION - - - **C. A. 208**

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1940

Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43, *sub-ss.* 1, 2; *s.* 56, *sub-ss.* 1, 2. ATTORNEY-GENERAL *v.* ST. AUBYN **C. A. 429**

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1946

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National Insurance (*Industrial Injuries*) *Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 89, *sub-s.* 1. HARRIS *v.* ROTOL, LD. **C. A. 573**

1947

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 12, *sub-s.* 2; *s.* 49, *sub-s.* 1; *s.* 118, *sub-s.* 1. HARLOW *v.* MINISTER OF TRANSPORT **Birkett J. 175**

1948

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Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 28, *sub-ss.* 1, 2; *s.* 29, *sub-s.* 1. REX *v.* NORFOLK JUSTICES. *Ex parte* DIRECTOR OF PUBLIC PROSECUTIONS - **Divl. Ct. 558**

—— —— *s.* 29, *sub-s.* 1; *s.* 3 (*a*). REX *v.* MIDDLESEX QUARTER SESSIONS. *Ex parte* DIRECTOR OF PUBLIC PROSECUTIONS - - **Divl. Ct. 589**

1949

Landlord and Tenant (*Rent Control*) *Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 40). REX *v.* BRIGHTON AND AREA RENT TRIBUNAL. *Ex parte* MARINE PARADE ESTATE (1936), LD. **Divl. Ct. 410**

—— —— *s.* 2, *sub-ss.* 1, 3, 5. HABERMAN *v.* WESTMINSTER PERMANENT BUILDING SOCIETY - - **C. A. 294**

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Landlord and Tenant (*Rent Control*) *Regulations*, 1949 (*s.* 1, 1949, *No.* 1096). REX *v.* BRIGHTON AND AREA RENT TRIBUNAL. *Ex parte* MARINE PARADE ESTATES (1936), LD. **Divl. Ct. 410**

Restriction of Repairs of Ships Order, 1940 (*St. R. & O.* 1940, *No.* 142), *para.* 1. FALMOUTH BOAT CONSTRUCTION CO., LD. *v.* HOWELL **C. A. 16**

ERRATUM

North General Wagon & Finance Co., Ld. v. *Graham* [1950] 2 K. B. p. 7. Title and shoulder notes throughout case. For " North " General " read " North Central."

Harris v. *Rotol, Ld.* [1950] 2 K.B. On pp. 573, 574 and 575, for August 17, 1948 (given as the date of the certifying surgeon's certificate) read August 17, 1949.

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

WAROQUIERS *v.* MARSDEN.

1949
Dec. 19.

Lord Goddard C.J., Humphreys and Hilbery JJ.

Procedure—Summary jurisdiction—Brothel-keeping—Summary offence by statute—Indictable offence at common law triable summarily—Summary offence only charged—Defendant's right to elect to be tried by a jury—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 17, *sub-s.* 1*—Criminal Law Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13, *sub-s.* 1.

Assisting in the management of a brothel is an offence at common law and as such is triable on indictment. By s. 13, sub-s. 1, of the Criminal Law Amendment Act, 1885, a person convicted of the offence of assisting in the management of a brothel is on summary conviction liable, if it is a first conviction, to not more than three months' imprisonment. By s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879, a defendant may elect to be tried by a jury if he is charged before a court of summary jurisdiction with an offence for which he is liable on summary conviction to be imprisoned for more than three months.

Where a person is alleged to have kept or assisted in the management of a brothel the prosecution may charge him with the statutory or with the common-law offence at its discretion. In the former event the defendant has no right to elect to go for trial by a jury because he will not be within s. 17 of the Summary Jurisdiction Act, 1879, and it is immaterial that on the same

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facts he could have been charged with a common-law offence, in which case he would have had that right.

Per curiam: When a defendant is charged before a court of summary jurisdiction with a summary offence connected with brothel-keeping, contrary to s. 13, sub-s. 1, of the Act of 1885, the court nevertheless has a right, if it thinks that there are special circumstances, to commit him for trial.

Rex v. *Norman* (1922) 17 Cr. App. R. 29, explained.

CASE STATED by the chief metropolitan magistrate sitting at Bow Street Magistrates' Court.

An information was preferred by a police officer against the defendant, Alphonse Waroquiers, charging him with the offence of assisting in the management of a brothel under s. 13 of the Criminal Law Amendment Act, 1885, and s. 3 of the Criminal Law Amendment Act, 1922. By the latter section : " any person who is convicted of an offence " in connexion with brothel-keeping as specified in " s. 13 " of the principal Act [of 1885] shall be liable on summary " conviction (*a*) to a fine not exceeding one hundred pounds " or to imprisonment . . . . for a term not exceeding " three months," for a first offence.

Assisting in the management of a brothel is also an offence at common law and as such is triable on indictment.

The defendant had not previously been convicted of any offence in connexion with the keeping or management of a brothel.

It was contended for him before the magistrate that assisting in the management of a brothel was a common-law offence ; that s. 13, sub-s. 1, of the Act of 1885 created no new offence but was merely declaratory of the common law and only made the offence of assisting in the management of a brothel also triable summarily ; and that he was therefore entitled to elect to be tried by a jury under s. 17 of the Summary Jurisdiction Act, 1879 (1).

It was contended for the prosecutor that the defendant was not charged with the common-law offence, but with a summary offence against s. 13, sub-s. 1, of the Act of 1885 ;

(1) Summary Jurisdiction Act, 1879, s. 17, sub-s. 1 : " A person " when charged before a court " of summary jurisdiction with " an offence, in respect of the " commission of which an offender " is liable on summary conviction " to be imprisoned for a term " exceeding three months . . . . " may, on appearing before the " court and before the charge is " gone into but not afterwards, " claim to be tried by a jury . . . ."

that, as that section provided, in the case of a first offence, for summary conviction and a maximum penalty of three months' imprisonment, the offence charged was not one to which the election given by s. 17 of the Act of 1879 applied; and that the defendant therefore had no right to elect to be tried by a jury.

The magistrate upheld the contention of the prosecutor and adjourned the hearing of the information.

Salmon K.C. and *Du Cann* for the defendant.

Vernon Gattie for the prosecutor.

The arguments are sufficiently indicated in the contentions before the magistrate above set out.

LORD GODDARD C.J. The magistrate decided that the defendant had no right to be tried by a jury, but agreed to state a case before proceeding with the information because, no doubt, he felt that if this court took a different view his order might have to be quashed, quite irrespective of the guilt or innocence of the defendant, because it might be said that he had had no jurisdiction to try the case.

The difficulty here, if there be one, is caused by something said in the Court of Criminal Appeal in *Rex* v. *Norman* (1). Brothel-keeping has always been an offence at common law: it is indictable as a common nuisance. In the course of his judgment in *Rex* v. *Norman* (1), Avory J., referring to s. 13, sub-s. 1, said: "The latter sub-sections create "new offences, whereas the offence under the first sub-"section is merely the common-law offence, and the sub-"section only makes it an offence also triable summarily."

There is no doubt—and I think that this is what Avory J. had in mind—that if a man is charged under s. 13, sub-s. 1 of the Act of 1885 with keeping a brothel, the offence thus being laid as an offence against that sub-section, the magistrate may, if he thinks it a very serious case, decide not to determine it summarily, but to send it for trial as a common-law offence. He cannot send it for trial as an offence against the sub-section because the sub-section makes it a summary offence. The prosecutor can in the first instance, I think, decide whether he will charge a summary offence, in which case the defendant is only liable to a fine of 100*l.* or three months' imprisonment; or he can charge a common-law offence, in which case it would

(1) (1922) 17 Cr. App. R. 29.

have to go for trial as such an offence and the defendant would be liable to imprisonment for two years and a fine at discretion.

The words of s. 13 of the Act of 1885 are: "Any person "who (1.) keeps or manages or acts or assists in the manage- "ment of a brothel, or (2.) being the tenant, lessee or occupier "of any premises knowingly permits such premises or any "part thereof to be used as a brothel or for the purposes of "habitual prostitution, or (3.) being the lessor or landlord of "any premises, or the agent of such lessor or landlord, lets "the same or any part thereof with the knowledge that such "premises or some part thereof are or is to be used as a brothel, "or is wilfully a party to the continued use of such premises "or any part thereof as a brothel, shall, on summary con- "viction . . . . be liable (1.) to a penalty not exceeding "twenty pounds, or, in the discretion of the court to imprison- "ment for any term not exceeding three months . . . ."

If the prosecution elect to proceed in a court of summary jurisdiction on that offence as a summary one, it seems to me that they are entitled to do so; and if they proceeded on the offence as at common law the defendant would have to go for trial. By s. 17 of the Summary Jurisdiction Act, 1879, the defendant only has a right to elect to be tried by a jury if he is liable to a penalty of more than three months' imprisonment. It seems to me that the effect of an enactment in the terms of s. 13, sub-s. 1, of the Act of 1885 is that the matter can be treated as a summary offence by the prosecution, and that if it is so treated it becomes a summary offence for all purposes. Section 17 of the Summary Jurisdiction Act, 1879, applies, and it only gives the defendant an election to go for trial by jury if he is liable to a sentence of more than three months' imprisonment.

The nearest case on the subject—the point does not seem to have arisen exactly before—is *Kerwin* v. *Hines* (1). There a man was charged with keeping a disorderly house. The old statutes concerned with keeping disorderly houses were 25 Geo. 2, c. 36 and 58 Geo. 3, c. 70. Anybody with the curiosity to read those sections will find how very elaborate the proceedings were. It was said in that case that the information was not properly laid in respect that no notice in writing had been given by two inhabitants of the parish paying scot and bearing lot therein—whatever that may mean; and that the overseers had not been summoned, or certain proceedings taken before a justice; nor had the overseers

(1) (1886) 50 J. P. 230.

or constable been bound over to produce material evidence under the statute. There were elaborate provisions for the sharing of the penalties; and by the enactment corresponding with s. 13, sub-s. 1 of the Act of 1885 there was power to prosecute the keepers of a disorderly house for a summary offence.

The court decided in *Kerwin* v. *Hines* (1) that if the proceedings were taken under s. 13, sub-s. 1, that did not disentitle the informants from sharing in and receiving the reward given by the earlier statute. I observe that Mathew J. in giving judgment said (2): "But the procedure under the late "Act which is independent of the earlier Acts may also be "taken by itself if the prosecutor pleases." Certainly there is, I think, no case in which the defendant can elect to go for trial except where the right is expressly given to him by statute. If the offence is a summary one, he gets his election under s. 17 of the Act of 1879. Of course, if it is an indictable offence made triable summarily by other provisions in the Summary Jurisdiction Acts, different considerations arise; but where the offence is made summary by statute—and I think that that is the only construction which we can give to this statute—the defendant has no election except that given by s. 17.

The prosecution can decide whether they will proceed in respect of a summary or of an indictable offence. The magistrate, once the offence has come before him, will determine it as a summary offence unless he thinks that, because it is so serious, or for any other good reason, the defendant ought to be committed for trial; and if the depositions do disclose that a common-law offence has been committed there is no doubt that the magistrate can commit a defendant for trial. Then he would be indicted not for an offence against s. 13, sub-s. 1, but for the common-law offence.

In these circumstances, the magistrate came to a right decision in point of law.

HUMPHREYS J. I am of the same opinion. I think it important that no doubt should be thrown by any decision of this court on the right of a prosecutor to proceed against an accused person on any charge which in law correctly fits the facts.

Section 13, sub-s. 1 of the Act of 1885 has provided that a person convicted of a number of things, including the keeping or

(1) 50 J. P. 230.
(2) Ibid. 231.

managing or assisting in the management of a brothel shall, on summary conviction in manner provided by the Summary Jurisdiction Acts, be liable to a penalty which includes imprisonment for a term not exceeding three months.

It is clear that, so far, there is no sort of right of election by a defendant to be committed for trial by jury; it was argued on behalf of the defendant here that he had that right. Whence did he get it? Certainly not from the Summary Jurisdiction Act, 1879, for s. 17 provides: "A person "when charged before a court of summary jurisdiction with "an offence, in respect of the commission of which an offender "is liable on summary conviction to be imprisoned for a term "exceeding three months" shall have a right of election. That is not this case. I ask again: where does the defendant get his right? He is said to derive his right to be tried by a jury from the fact that certain acts may amount to two offences, one at common law and one under statute, and that they may be precisely similar offences. I do not find any authority in any case for that proposition. It seems to me that the law has been rightly understood ever since 1885 to be that a person who is brought before a court of summary jurisdiction is liable to be treated in the manner provided for that offence. The mere fact that if he had been charged with some other offence or with that offence under another Act different consequences might ensue seems to me to be quite immaterial. I therefore think that the magistrate was right in saying that the defendant had no right of election to go before a jury.

I would add that I entirely agree with my Lord that if a magistrate in any such case comes to the conclusion that there are special circumstances in the case which would make it in the interests of justice that the defendant should be sent to take his trial before a jury, when he would be liable to a much heavier punishment, he has the right to commit the defendant for trial whether he likes it or not. That right, I think, is undoubted; but, unless the magistrate chooses to act in that way or the prosecutor chooses to enter on the charge sheet a charge of keeping a brothel at common law, there is no right of election, and the magistrate was right in the decision to which he came.

HILBERY J. I concur.

Appeal dismissed.

Solicitors: *Albin, Hunt & Stein*; *Allen & Son.*

L. F. J. McD.

pplied. ALEXANDER
. RAILWAY EXECUTIVE
[1951] 2 K. B. 882

NORTH GENERAL WAGON & FINANCE CO. LD. *v.* GRAHAM.

m *of* COHEN, L.J., at p. 15,
d. ALEXANDER *v.* RAILWAY
UTIVE. [1951] 2 All E.R. 442.

[1948 N. 1645]

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Cohen, Asquith and Singleton L.JJ.

Contract—Hire-purchase—Motor car—Right to terminate agreement on breach of stipulations by hirer—Notice to terminate not required—Sale of car by auction—Auctioneer sued for conversion—Owner's right to immediate possession on sale.

Distinguished. RELIANCE CAR FACI-
LITIES LD. *v.* RODING
MOTORS
[1952] 2 Q.B. 844

By a hire-purchase agreement the hirer of a motor car agreed that he would not do anything which would tend to affect prejudicially the ownership or financial position of the owners in relation to the vehicle, and that he would not sell, loan, or part with its possession. On the failure of the hirer to observe or perform any stipulation into which he had entered, power was given to the owners of the car to terminate the hiring. The agreement contained no provision requiring that notice should be given as a condition precedent to its termination. In breach of the agreement the hirer placed the car with the defendant, an auctioneer, for sale, and it was sold by auction to the highest bidder. The owners brought an action against the auctioneer for conversion.

Held, that, on the breach by the hirer of his stipulations under the agreement, the owners had the right, not merely to terminate the agreement, but to the immediate possession of the motor car; that their right to possession arose as soon as the defendant was instructed to sell the car; and that, as they were entitled to possession of it when he sold it, they were in a position to maintain an action for conversion against him.

APPEAL from Lewis J.

By a hire-purchase agreement dated May 8, 1947, the plaintiffs, North Central Wagon & Finance Co. Ld., let to one G. V. Cole a Standard motor car. By cl. 4, the agreement provided that " During the hiring the hirer . . . . (*e*) . . . . " will not do or allow to be done anything which will tend " prejudicially to affect the ownership or financial position " of the owners in relation to the vehicle." By cl. 5 it was provided that " During the continuance of this agreement " the hirer shall not sell, pledge, charge or assign the benefit " of this agreement, nor loan nor part with the possession of " the vehicle nor attempt to sell, pledge, charge, assign, " sublet or otherwise dispose of the vehicle . . . ." By cl. 7 (i): " If the hirer shall fail to pay any sum due hereunder " or to observe or perform any stipulation on his part herein " contained, the owners may terminate the hiring; and "thereupon the hirer shall pay to the owners the whole of "the sums specified under the heading 'Terms of Hire' "in the schedule . . . . (ii) If this hiring is terminated for any "reason appearing at the beginning of this clause the owners "may by written notice to the hirer and subject to similar "stipulations put an end to the hiring under any other "agreements subsisting between them and the hirer." In cl. 10 it was stated that "this agreement is only a contract "of bailment for hire. . . . ."

The hirer of the car fell into financial difficulties, and on July 2, 1947, he entered the car as his own property in a sale which was to be conducted by the defendant, A. F. Graham, an auctioneer, against whose bona fides in the matter no allegation was made. The car was sold by the defendant for 202*l.* 10*s.* 0*d.* to one Selby at a public auction at the Nottingham cattle market, and was subsequently sold by Selby to one Sibley. After the sale by auction the hirer continued to pay to the plaintiffs the instalments due under the hire-purchase agreement, and it was not until January, 1948, that they discovered that the car was registered in the name of Sibley.

On November 4, 1948, they issued a writ against the defendant claiming damages for conversion. The defendant denied liability for conversion, and pleaded, inter alia, that the sale was a sale in market overt; but that point was not persisted in at the trial.

Lewis J. held that, on the true construction of the hire-purchase agreement, the plaintiffs were not at the time of the sale entitled to the possession of the car so as to enable them to maintain an action for conversion against the defendant. The plaintiffs appealed.

Pocock for the plaintiff company. The decision of Lewis J. was wrong. When the bailee of the car entered it as his own for sale in the auction to be held by the defendant, he broke the terms of cll. 4 and 5 of the hire-purchase agreement, with the result that, at the actual time of the sale by the defendant, the plaintiffs had (1.) property in the car, and (2.) a right to terminate the agreement, which automatically gave them a right to its immediate possession

[Asquith L. J. Until the plaintiffs gave notice to terminate the hiring, would it not continue, with the result that they had no right to possession ?]

It is submitted that that would not be the position. The agreement required neither notice, a demand, nor any other act to terminate it. The case falls within the decision in *Jelks* v. *Hayward* (1). It was there held that if at the time of the wrongful sale of goods the subject of a hire-purchase agreement, the owner was entitled to take possession of them, he could maintain an action in trover against a third person. Kennedy J. said that, when the goods there in question were seized by the bailiff, the owners became entitled to the possession of the goods without notice or demand immediately they were seized. *Jelks* v. *Hayward* (1) followed the decision in *Manders* v. *Williams* (2), which is also an authority in the plaintiffs' favour.

Apart from the actual terms of the agreement in the present case, the act of the bailee in putting the car up for auction was an act so repugnant to his position as bailee that it gave the bailors the immediate right to possession. In Pollock and Wright on Possession in the Common Law, p. 132, the law is stated as follows: "Any act or disposition which is "wholly repugnant to or as it were an absolute disclaimer "of the holding as bailee reverts the bailors right to possession, "and therefore also his immediate right to maintain trover "or detinue even where the bailment is for a term or is "otherwise not revocable at will, and so a fortiori in a bailment "determinable at will." See also p. 166. In the present case the act of the bailee was entirely repugnant to, and quite inconsistent with, the terms of the contract.

[ASQUITH L.J. Is there no direct modern authority on the question whether such an agreement as we are discussing could be terminated without notice?]

There appears to be no case later than *Jelks* v. *Hayward* (1) in 1905. [Counsel also referred to the following authorities: *Cooper* v. *Willomatt* (3); *Loeschman* v. *Machin* (4); *Bradley* v. *Copley* (5); *Donald* v. *Suckling* (6); and Halsbury's Laws of England (2nd ed.), vol. 1, p. 736, para. 1211.]

Elwes for the defendant. The conclusion at which Lewis J. arrived was the right one. He properly focussed his attention on the actual terms of the hire-purchase agreement, and held that, on its true construction, a breach of the term which

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(1) [1905] 2 K. B. 460.
(2) (1849) 4 Ex. 339.
(3) (1845) 1 C. B. 672.
(4) (1818) 2 Starkie 311.
(5) (1845) 1 C. B. 685.
(6) (1866) L. R. 1 Q. B. 585.

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forbade the bailee to make away with the car did not give the owners an immediate right to possession which would enable them to maintain an action for conversion. The passages from Pollock and Wright on Possession in the Common Law and Halsbury's Laws of England, relied on by the plaintiffs, concern simple cases of bailment, in which there were no such difficulties as exist in the present case. Here there can be no question of the owners' rights reverting to them if the contract lapses as the result of an act repugnant to it committed by the bailee. The contract itself envisages that conduct of that kind by the bailee is possible, and consequently regulates the rights of the parties if such a thing should happen. That being so, the owners are restricted to the remedies provided in the contract. The words "may "terminate" in cl. 7 (i) clearly connote that there must be some act done, or notice given to the owners, before they can retake possession. At the date of the auction sale the plaintiffs had not an immediate right to possession, and the reason for that is to be found in the contract which they made. They could have given themselves an immediate right to possession by using plain and unambiguous words. They have not done so, and they cannot ask that a construction favourable to them should be put on the ambiguous phrases which they have used.

Cohen L.J. I will ask Asquith L.J. to deliver the first judgment.

Asquith L.J. [after stating the facts and reading the material clauses of the hire-purchase agreement :] Lewis J. was admittedly much influenced in his judgment by the fact that the hire-purchase agreement is not one of those hire-purchase agreements in which the effect of a breach by the hire-purchaser is expressed ipso facto to put an end to the agreement. It is, on the other hand, plainly a hire-purchase agreement of the type which, on specified breaches occurring, vests in the lessor on hire-purchase the option to terminate the hiring or not as he chooses. Lewis J. said : "In my view, the question that I have to decide in this case "is whether, on the true construction of the terms of this "contract, when there has been no action taken by the owner "to terminate the contract, the fact (to give an example) "that the hirer was late one month in paying his hire-purchase "instalment ipso facto terminates the hire-purchase agreement. "Directly the hire-purchase agreement is terminated possession "of the goods vests once more in the owner, and therefore, "in that event, he is the person who is entitled to possession "of the goods. As I have said, the whole point here is whether, "in the events which happened in this case, the right to "possession was in the owners." At the end of his judgment he stated his decision in these terms: "In my view, the "position here is that Mr. Elwes's argument—namely, that "the plaintiffs were not entitled to possession at the time of "the sale—prevails; and the defendant, therefore, is entitled "to succeed on the ground that the plaintiffs have not "satisfied me on the terms of the hire-purchase agreement "that they were entitled to possession in view of the events "which happened in this case."

The point in the case, which may be very shortly stated, is this: when a bailor and lessor on hire-purchase wants to sue in conversion by reason of the wrongful sale by the bailee of the article bailed, it is essential for him to show that he is entitled at the time of the sale to immediate possession of the goods; and the question is whether, by the terms of this particular hire-purchase agreement, he was in that position at the time of the sale. But Mr. Pocock, for the plaintiffs, raises another point independent of the precise terms of the hire-purchase agreement: he contends that a bailee who comports himself in a manner utterly repugnant to the terms of a bailment terminates the bailment and thereupon the right to possession revests in the bailor. A bailee who sells the thing bailed without the knowledge or consent of the bailor is clearly guilty of such conduct.

That, as a general principle of law, is not really in dispute. it applies where the contract either is a very simple one or does not make specific provision as to the rights of the parties in the event of particular breaches. But where, as here, there is a contract which makes such special provision, what has to be taken into account is not the general law, but the position which arises having regard to those express stipulations. The question in the present case is whether, having regard to the terms of cl. 7, and particularly cl. 7 (i), the effect of the breach was not merely to give the plaintiffs a right to terminate the hiring, but also to entitle them to say that at the time of the sale they had a right to immediate possession of the goods.

Several cases were cited, *Manders* v. *Williams* (1); *Jelks* v. *Hayward* (2); and *Bradley* v. *Copley* (3), being the principal ones. *Jelks* v. *Hayward* (2) is by far the closest on facts to the present case. The headnote in that case states: "Furniture was let for hire with an option of purchase under "a hire-purchase agreement, which contained a clause giving "the owners the right without previous notice"—those words are important—"to determine the hiring and retake "possession of the furniture, if it should at any time be seized "or taken in execution. The furniture was taken in execution "by the high bailiff of a county court, and, no claim having "been made to it, was appraised and sold under the execution "and the proceeds paid into court, and the furniture delivered "to the purchaser. On the day after the sale the owners "heard for the first time of the seizure and sale of the furniture, "and gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high "bailiff, and in the course of the interpleader proceedings "the execution creditor admitted the title of the claimants, "who gave a notice claiming damages against the high bailiff "in respect of the alleged conversion of the furniture by "selling it: Held, that, as under the hiring agreement the "claimants had a right to retake possession immediately "upon its being taken in execution, the sale by the high "bailiff amounted to an act of conversion for which he was "responsible in damages to them."

Kennedy J. there said (4): "Whatever interest the "apparent possessor, the execution debtor, had in the goods "seized, he had by the terms of the hire-purchase agreement "between him and the respondents; it was an interest "terminable ipso facto, on the occurrence of such a seizure "as actually took place; in other words, the respondents "became entitled to the possession of the goods, without "notice or demand immediately upon that act of seizure "by the bailiff. In order to maintain an action of conversion "for the subsequent sale by the bailiff, there must be a right "in the plaintiff to immediate possession of, as well as a "property in, the goods. In the present case there is no "question that the goods sold were the property of the "respondents: had they also a right to their possession at "the time of the sale? In my opinion, they had, because

(1) 4 Ex. 339.
(2) [1905] 2 K. B. 460.
(3) 1 C. B. 685.
(4) [1905] 2 K. B. 460, 467.

" the act of the bailiff in seizing entitled them to take possession " of the goods immediately upon the seizure."

If in that case there had not been the words " without " previous notice," it seems to me that it would have been precisely on all fours with this case, and one of the problems which we have to consider is whether that makes the whole difference. There are two possibilities: one is that the hiring can be terminated on a breach by simply retaking possession. Supposing that that is the proper construction of cl. 7 (i), then clearly a person who has a right to retake possession must necessarily have had a right to immediate possession in the events which have happened. To avoid that conclusion, therefore, it is necessary to establish that some other act, additional to or other than retaking possession, was necessary for the purpose of terminating the hiring. The easiest one to imagine is some form of notice; and the question, to my mind, really reduces itself to this: on the true construction of this contract, was any notice needed to terminate the agreement?

In answering that question it is to be noted that, if notice is needed, it can only be by virtue of an implied term, and I can see no necessity for such an implication. Moreover, it is fair to look at sub-cl. (ii) of cl. 7, because it is apparent that the judge was influenced by the language of that clause in his construction of sub-cl. (i). Sub-clause (ii) concerns contracts of hiring other than that of the car in respect of which a breach has occurred, and it provides that, if the lessor wishes to terminate those agreements, he is to give written notice. Surely (though the judge drew a different inference from sub-cl. (ii)) some significance attaches to the omission of any similar words in sub-cl. (i), which lies cheek by jowl with it? There is apparently no direct authority on the construction of the words " may terminate the hiring," and it is a little startling that there should not be, because it is the commonest form of expression in hire-purchase agreements. One would have expected that there would be cases which decided whether those words implied the necessity of notice as a condition precedent to the termination of the hiring, or whether a mere retaking would in itself constitute such a termination. But no cases on the point have been cited to us and I have no doubt that we have had all the available authorities before us.

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That being the position, I think that, on the principle of construction expressio unius exclusio alterius, we ought to hold that it is possible to terminate the hire in cl. 1 without any notice, and that the moment a breach of the kind covered by cl. 7 (i) occurs the owner has a right to immediate possession. I think that the law on all the authorities cited to us is correctly summarized in Pollock and Wright on Possession in the Common Law (at p. 166) where the authors state: "The remedies "of the bailee are not always exclusive, for the bailor by "reason of his right to possession may retain concurrently "with him a sufficient right to maintain trespass and theft "against strangers. This seems to be the case wherever "the bailment is revocable by the bailor at his pleasure either "unconditionally or upon a condition which he may satisfy "at will. But if the bailment is for a term certain (as in the "case of goods let to the tenant of furnished lodgings) or "determinable only after notice or after a default by the "bailee or upon any other occurrence which does not depend "on the will of the bailor, then until the term has expired "or been determined"—now follow the words that matter—"or become determinable at will, it seems that the bailor "is excluded and cannot maintain either trespass or theft "or trover even against a stranger." If the bailor in the present case had a right to terminate this hiring at will the moment after a breach such as has occurred in this case, then it seems to me that, within that language, the case becomes one in which the bailor has an immediate right to possession and can sue a third party in conversion.

For these reasons I think that the appeal should be allowed.

Cohen L.J. I am of the same opinion and for the same reasons, but, as we are differing from the judge in the court below, I will add just a few words of my own.

The case is not altogether an easy one. It turns, as the judge said, on the question whether, on the true construction of the contract and in the events which have happened, the plaintiffs became entitled to possession. As a matter of construction I agree with my brother that cl. 7 (i) of the agreement does not require notice as a condition precedent to the exercise by the plaintiffs of their right to terminate the hire. They can, I think, terminate the hire in any appropriate

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way, including the most obvious way of taking possession of the car. That being so, *Jelks* v. *Hayward* (1), to which my brother has referred, is clear authority for the view that the plaintiffs were in a position to maintain an action for trover.

I must further point out that the hirer, in instructing the defendant to sell, and in selling, the car, has committed a breach of the contract which goes to the root of it. In those circumstances the following passage in Halsbury's Laws of England (2nd ed.), vol. 1, p. 736, seems in point: "The act "of the bailee in doing something inconsistent with the terms "of the contract terminates the bailment, causing the "possessory title to revert to the bailor and entitling him "to maintain an action of trover." That view is stated in somewhat similar language in the following passage in Pollock and Wright on Possession in the Common Law (at p. 132): "Any act or disposition which is wholly repugnant "to or as it were an absolute disclaimer of the holding as "bailee revests the bailor's right to possession, and therefore "also his immediate right to maintain trover or detinue "even where the bailment is for a term or is otherwise not "revocable at will, and so a fortiori in a bailment determinable "at will." The authority cited for both those passages is *Fenn* v. *Bittleston* (2), the relevant passage occurring in the judgment of Parke, B.

Those passages, which seem to me, if I may respectfully say so, to be a correct statement of the law, definitely support the view which my brother has expressed—namely, that the plaintiffs are in a position to maintain an action in trover. But Mr. Elwes contends that they only apply where the contract is silent on the subject, and that here the contract provides what is to happen in the event of a breach of any stipulation and merely gives the right to terminate the contract. That, he says, is something distinct from a right to enter into possession, and the latter right is only exercisable after notice has been given to terminate the contract. As I have said, I do not so construe the contract, and I am glad to find that the construction which I place on the contract accords with the view of what the law would be in the absence of express provision and, if I may say so

(1) [1905] 2 K. B. 460.

(2) (1851) 7 Ex. 152, 159.

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respectfully, with what is a very reasonable position in the circumstances of the case.

For these reasons I agree that the appeal should be allowed.

SINGLETON L.J. I agree.

Appeal allowed.

Solicitors: *Jaques & Co., for Oxley and Coward, Rotherham; Jackson & Jackson for A. S. and A. E. Furniss, Worksop.*

P. B. D.

Affirmed on different grounds. H.L. [1951] 2 All E.R. 278.

Affirmed. HOWELL *v.* FALMOUTH BOAT CONSTRUCTION CO. [1951] A. C. 837

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Jan. 31; *Feb.* 1, 10.

Bucknill, Singleton and Denning L.JJ.

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Shipping—Ship repairs—Not to be carried out "except under the authority "of a licence granted by the Admiralty"—Oral permission sufficient —Restriction of Repairs of Ships Order, 1940 (*St. R. & O.* 1940, *No.* 142), *para.* 1—*Assumption of authority by Government officer— Whether subject protected if authority exceeded.*

The plaintiffs, ship repairers, at the order of the defendant did alterations and repairs at Falmouth from May, 1947, to the end of the year to a naval vessel, bought by the defendant for conversion into a passenger-carrying vessel. All the alterations and repairs done, down to October 11, 1947, were done after inspection by, and with the oral permission of, the licensing officer for the Admiralty at Falmouth, a surveyor of ships under s. 724 of the Merchant Shipping Act, 1894, and a Board of Trade surveyor. On October 11, 1947, the licensing officer signed a written licence authorizing the plaintiffs to carry out certain alterations and repairs. Some alterations and repairs were done to the ship, not covered by the written licence, but after inspection and by the express oral permission of the licensing officer. The written licence contained a standard condition: "This licence "shall automatically determine if any unauthorized alterations or "repairs are carried out."

By para. 1 of the Restriction of Repairs of Ships Order, 1940, the Admiralty, acting under reg. 55 of the Defence (General) Regulations, 1939, required that no person whose business was the repair or alteration of ships was to carry out in the United Kingdom any repairs or alterations to ships otherwise than to the order of any Department of His Majesty's Government in the United Kingdom, "except under the authority of a licence granted "by the Admiralty." A letter dated June 22, 1942, from the Admiralty to the licensing officer at Falmouth and signed by the

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Director of Merchant Ship Repairs, stated: "I understand that "it has been made clear to you that where you are dealing with "reliable ship repairers and owners with a good record, you "ought not to delay the putting in hand of obvious repairs, "merely pending the actual issue of a licence."

The plaintiffs having sued the defendants under the contract for the price of alterations and repairs done to the ship, the defendant pleaded that what was done was in contravention of a statute and so could not be made the subject-matter of an action, reliance being placed on *Bostel Bros. Ld.* v. *Hurlock* [1949] 1 K. B. 74, 79, citing Lord Ellenborough C.J. in *Langton* v. *Hughes* (1813) 1 M. & S. 593, 596.

Held, by Bucknill L.J. and Singleton L.J., that the word licence in the Restriction of Repairs of Ships Order, 1940, was to be construed not as being limited to a licence set out in a written, typed or printed document, but as including oral permission to carry out alterations and repairs to ships. Since all the alterations and repairs to the ship were carried out either under the written licence of the licensing officer or by his oral permission, the ship repairers were not in breach of the order or of the conditions contained in the written licence.

Jackson, Stansfield & Sons v. *Butterworth* (1948) 64 T. L. R. 481, distinguished.

Per Denning L.J. (who said that he was prepared to assume that the order postulated a licence in writing): Nevertheless, the order could be varied without any formality or publicity: see reg. 98 of the Defence Regulations, 1939, and *Blackpool Corporation* v. *Locker* [1948] 1 K. B. 349, 370. The letter of June 22, 1942, from the Admiralty to the licensing officer was cogent evidence that the order had been varied so as to include oral permission by the licensing officer to carry out alterations and repairs to ships. If that were wrong, the case was covered by a principle of particular importance today, when officers of government departments were given much authority by orders and circulars, the terms of which were not available to the public. The principle was that, whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they have assumed.

Robertson v. *Minister of Pensions* [1949] 1 K. B. 227, followed.

Accordingly, the court held that the plea raised by the defendant to the plaintiffs' claim for executing alterations and repairs to the defendant's ship at the defendant's order did not disclose a good defence.

APPEAL from the decision of an official referee on a preliminary issue.

The defendant, in December, 1946, bought a sea-going naval vessel M.L. 229, and early in 1947 he contracted with the plaintiffs, ship repairers, to convert the ship, at Falmouth, into a passenger-carrying vessel. On February 3, 1947, the plaintiffs, before they did any work on the vessel, made written application on form M.S.4 to the licensing officer at Falmouth, one Thompson, to grant them a licence to do the work. The officer in question was the surveyor of ships under s. 724 of the Merchant Shipping Act, 1894, and also the licensing officer for the Admiralty under the order restricting the repairs of ships, and was expressly authorized by the Admiralty to sign licences on their behalf. He was also a Board of Trade surveyor and the Ministry of Transport's senior surveyor at Falmouth. The officer said that he would not grant them a licence at that time since he was short of timber. The plaintiffs said that they had sufficient materials with which to carry on, and that first there was a lot of stripping to do. The licensing officer said that he had no objection to the plaintiffs' carrying on with the work and that he would give them a licence as soon as he had materials available. The plaintiffs started on the work in May, 1947. The licensing officer and his assistant inspected the work three or four times a week and gave oral permission for all the work which was done. Wanting timber, the plaintiffs made another application for a licence, filling in a printed application form with the words: "to complete "B.O.T. requirements for modified steam 3 certificate." They should have applied for a licence "to complete "the alteration of the ship such completion to be in accordance "with the B.O.T. requirements for modified steam 3 "certificate." The licensing officer and the plaintiffs took the application to be for a licence covering the completion of the ship. There was a small portion of the work not within the B.O.T. requirements. The officer granted the application, as asked, by a written licence dated October 11, 1947, and he and his assistant continued to inspect the work and to give oral permission for all the work done. In January, 1948, the work on the ship ceased for reasons immaterial to the question before the Court of Appeal.

The plaintiffs claimed from the defendant for the work which they had done 4,371*l.* 11*s.* 7*d.*, being 6,871*l.* 11*s.* 7*d.* less 2,500*l.* paid on account. The defendant disputed the claim on several grounds, one of which was that what is done in contravention of the provisions of a statute cannot be made the subject matter of an action: *Bostel Bros. Ld.* v. *Hurlock* (1).

By art. 1 of the Restriction of Repairs of Ships Order, 1940, the Admiralty, acting under reg. 55 of the Defence Regulations, 1939, required that " No person whose business " or part of whose business is the repair, alteration or dry-" docking of ships shall carry out or cause or permit to be " carried out in the United Kingdom, repairs or alterations " to or the drydocking of ships otherwise than to the order " of any department of His Majesty's Government in the " United Kingdom except under the authority of a licence " granted by the Admiralty." Where a written licence was given it contained, as did that of October 11, 1947, a standard condition: " This licence shall automatically determine if any " unauthorized alterations or repairs are carried out."

A letter from the Admiralty to the licensing officer dated June 22, 1942, and signed by the Director of Merchant Ship Repairs stated: " On the other hand, I understand that it " has been made clear to you that where you are dealing with " reliable ship repairers and owners with a good record, you " ought not to delay the putting in hand of obvious repairs, " merely pending the actual issue of a licence."

The defendant contended that the licence referred to in the order of 1940 was a written licence, and consequently that all the work done by the permission of the licensing officer before October 11, 1947, was illegal, since it was only done by the oral permission of that officer; and, further, that the work could not be made legal by the subsequently granted licence having retrospective effect. This argument was supported by the decision of the Court of Appeal in *Jackson, Stansfield & Sons* v. *Butterworth* (2) on reg. 56A of the Defence Regulations, 1939, which, it was contended, was indistinguishable from that case. Secondly, he contended that, since, after the licence was granted, a small amount of work was done which was unauthorized by the written licence as not coming within the words " to " complete Board of Trade requirements," he contended that although the work was performed after inspection and with the oral permission of the licensing officer, yet, by reason of the condition (above set out) contained in the written licence, the licence was automatically determined.

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(1) [1949] 1 K. B. 74, 79. (2) (1948) 64 T. L. R. 481.

The sum sued for, therefore, for the work done, after the grant of the written licence—2,300*l.*—was not due. The official referee felt bound to give effect to these defences which were contained in paras. 4 to 7 of the amended defence. The plaintiffs appealed.

Ryder Richardson and *S. Noakes* for the plaintiffs. Every item of work done to this vessel was done, after inspection, with the approval of the licensing officer at Falmouth or his assistant officer. The Restriction of Repairs of Ships Order, 1940, which continued in force from February, 1940, until September, 1949, was made under reg. 55 of the Defence Regulations, 1939. The necessity for licence for alterations and repairs to ships does not depend upon the terms of reg. 55, as in the case of reg. 56A for the control of building operations, but on the terms of this order made under reg. 55, which can be varied at will (see reg. 98) and without information as to the variation to the public: see *Blackpool Corporation* v. *Locker* (1).

The court is concerned only with the construction of this order, which provides that repairs to ships must not be carried out " except under the authority of a licence granted by the " Admiralty." This is a penal enactment and must be construed strictly; and if there is ambiguity it must be construed in favour of the subject. It should be construed " contra " proferentem." It is clear that the licence envisaged may be oral since, if it were not so, ship repairing, more especially in time of war, would be impossible. Often repairs must be done immediately to keep a ship afloat. Further, in wartime, there is the urgent need for all available shipping, so that there must be no delay in either altering or repairing a ship. The licensing officer pointed out that he might have from 20 to 25 ships at Falmouth in for repair at the same time. If the word " licence " in the order includes an oral licence, all difficulty disappears, since the standard condition in the written licence given on October 11, 1947, that the licence should automatically determine, if any unauthorized alterations or repairs were carried out, would not be broken. There were here no unauthorized alterations and repairs to this ship.

The decision in *Jackson, Stansfield & Sons* v. *Butterworth* (2) must be distinguished from this case. There it was held (Jenkins J., dissenting) that " a licence granted by the

(1) [1948] 1 K. B. 349.

(2) 64 T. L. R. 481.

" Minister " (of Works) " under reg. 56 A (1) of the Defence " Regulations, 1939, must be in writing." But reg. 56 A concerns the control of building operations, which seldom seem to be matters of urgency. Further, by provisoes (*a*) and (*b*) to art. 6, special defences are provided for an accused person if he had reasonable grounds for believing that the cost would not exceed the amount stated and if the acts done without authorization or licence were urgently necessary and were done in circumstances of emergency which rendered it impracticable to obtain the necessary authorization or licence. Reg. 56A is, in effect, a complete code in itself : there is nothing of that kind to be found in reg. 55 or in this order of 1940 made under it.

Havers K.C., *C. H. Duveen* and *I. Percival* for the defendant. The defendant pleaded that what was done by the plaintiffs in work on this ship was in contravention of a statute and so could not be made the subject matter of an action : see the judgment of Somervell L.J. in *Bostel Bros. Ld.* v. *Hurlock* (1), citing Lord Ellenborough in *Langton* v. *Hughes* (2). If the Restriction of Repairs of Ships Order, 1940, is compared with its predecessor, the Restriction of Repairs of Ships Order, 1939, where the Board of Trade were the licensing authority, and para. 1 of which was in similar terms to those of para. 1 of the order of 1940 but contained a proviso concerning work on hand, it will be seen that the word " licence " in both orders contemplated a document and only a document.

The proviso to art. 1 of the order of 1939 was that " nothing " in the foregoing provisions shall be taken to require the " suspension of repairs or alterations to or the cessation of " drydocking to any ship which, at the coming into force of " this Order, is in course of being repaired or drydocked," if notice were given of the alteration, repair or drydocking to the Board of Trade within seven days from the coming into force of the order and within a further period of seven days the Board of Trade granted a licence for the authorization of the repair, alteration or drydocking. The words of art. 1 of the order of 1940 by themselves are only appropriate to a document in writing.

The Admiralty were in effect requiring the ship-repairer to present to the licensing officer a specification of the alterations and repairs which they desired to effect. A stamped endorsement and signature would provide the necessary licence. This was required before such alterations and repairs could be begun, and also as a record. The licensing officer's oral permissions merely constituted his undertaking that he would not prosecute these ship-repairers if they proceeded with the work which he had approved without a licence. Article 2 of the order of 1940 preserving a licence under the order of 1939 in existence when the order of 1940 came into existence necessarily refers to a licence which is in writing, typed or printed as a document. An oral permission granted under the order of 1939 would not be preserved by art. 2 of the order of 1940. The decision in *Jackson, Stansfield & Sons* v. *Butterworth* (1) concludes this case: see the judgments of Scott L.J., and of Asquith L.J., in that case. The effective enforcement of the licensing system could never be achieved except by means of a written licence. If the word "licence" in the order of 1940 would include an oral unrecorded authorization, the certainty needed for a criminal prosecution would be deficient.

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(1) [1949] 1 K. B. 74, 79.

(2) (1813) 1 M. & S. 593, 596.

Section 2, sub-s. 5 of the Emergency Powers (Defence) Act, 1939, secures that the Defence Regulations may provide for a fee to be charged in respect of "any licence, permit, "certificate or other document for the purposes of the regula-"tions." Reg. 88 of the Regulations of 1939, which is in identical language. Reg. 87 (3) provides that "Any permit, licence, permission or authorization granted "for the purposes of any of these regulations may be revoked "at any time by the authority or person empowered to grant "it." Here it is plain that the word "permission" may refer to an oral permission as contrasted with a licence, which must be contained in a document. The Government in time of war becomes a Committee of Public Safety: see the judgments in *Rex* v. *Halliday* (2), and *Liversedge* v. *Anderson* (3).

Even if a licence could be oral, could it be said that, in fact, the licensing officer had power to grant an oral licence? Nor can a written licence be retrospective: that appears from the language employed in reg. 55, and also in the order of 1940. The words of reg. 56 A (2) are: "except in so far as there is "in force in respect thereof a licence granted by the Minister." The words of the order of 1940 made under reg. 55 are that no

(1) 64 T. L. R. 481.
(2) [1917] A. C. 260.
(3) [1942] A. C. 206.

ship repairer shall carry out repairs or alterations to a ship "except under the authority of a licence granted by the "Admiralty." Though there is a slight difference in language between reg. 56 A and the order of 1940 made under reg. 55, they must be construed in the same way. In any case the licence was not retrospective: see the order of 1940. Any practice which a government department may adopt is irrelevant, and the question is one solely of construction. As Scott L.J. said in *Jackson, Stansfield & Sons* v. *Butterworth* (1): "I do not . . . . suggest that the mere fact that he" (The Minister of Works) "construed the words 'a licence' "in a particular way has any legal relevance to the problem "of interpretation which we have to determine." See also the first words of the judgment of Asquith L.J., in that case.

Ryder Richardson replied.

Cur. adv. vult.

Feb. 10. BUCKNILL L.J. I will ask DENNING L.J. to give judgment first.

DENNING L.J. [after stating the facts]. The essence of the argument for the defendant is that a written licence was necessary, and that no oral permission could take its place; nor could any of its terms or conditions be waived by any oral dispensation. The steps by which that result is reached are logical enough, but these courts have never been disposed to give effect to a ruthless logic if it means that injustice will thereby be done. So it was sought to strengthen the logic by the argument of expediency. Resort was had to the observations of Scott L.J., in *Jackson, Stansfield & Sons* v. *Butterworth* (2), and it was said that this court would be quite justified in ignoring the oral permission given by the licensing officer because "the effective enforcement of the "licensing system could never be achieved except by means "of written licences"; and further that "if the licence were "merely an unrecorded oral permission, the certainty needed "for a criminal prosecution would not be a practical "possibility."

Whatever the merits of that argument under the Building Regulations—and I confess that the view of Jenkins J., who dissented in that case, appeals much to me—the argument has no merits whatever under the Restriction of Repairs of

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(1) 64 T. L. R. 481, 482.

(2) Ibid. 481.

Ships Order, 1940, because there is overwhelming evidence that it was administratively very convenient, indeed almost essential, that the licensing officers should be able to give oral permission for work to be done before they issued a written licence. The reason was because it took some time to get out a licence, and it would be quite intolerable that ships in need of repair should be held up in port, idle, waiting for a licence when it was most important to get on with the work.

The Admiralty themselves acted on this sensible view. On June 22, 1942, the Director of Merchant Ship Repairs, writing from the Admiralty, sent a circular letter to all licensing officers in which he said : " I understand that it has been made clear " to you that when you are dealing with reliable ship repairers " and owners with a good record, you ought not to delay the " putting in hand of obvious repairs, merely pending the actual " issue of a licence." The licensing officer said that he had granted permission in that way ever since the beginning of the war. Let me quote his actual words : " I was the only " licensing officer at Falmouth. Sometimes I had as many as " twenty to twenty-five ships in for repair at one time and " it was almost impossible to deal with the licences immediately " because I had to go through the ship's repair list and cut out " what I thought was unnecessary, to get the ship in operation. " Therefore it was quite a fairly common practice with me " to defer the issue of the licence until time permitted for the " licence to be issued. In the meantime, I would give permission for the work to carry on. If I had not done that, " ships would have had to spend rather longer in port than " was necessary."

That shows the way in which the Admiralty and their licensing officers acted. In order to avoid delay to ships they gave oral permission for the work and followed it up later by a written licence. It was a very sensible thing to do. Yet we are asked to say that it was illegal and that the ship-repairers were guilty of a criminal offence—when all that they did was to do as they were told by the licensing officer. If they were guilty, then surely the Admiralty and their licensing officer were even more guilty for leading them astray.

The truth is, that none of them were guilty of a criminal offence at all. Let me explain why that is so : it really depends on the nature of this order issued by the Admiralty in 1940. That was not an Act of Parliament and should not be treated as such. Nor was it even a Defence Regulation such as reg. 56 A, which was considered by this court in the *Jackson Stansfield* case (1). It was merely an Order made by the Admiralty under the authority of reg. 55 of the Defence Regulations, 1939. As such it was not discussed in Parliament or laid on the table of the House. It was not even necessary that it should be made public: see *Blackpool Corporation* v. *Locker* (2). It could be made without any formality or publicity and—this is the point—it could be revoked or varied likewise: see reg. 98 of the Defence Regulations, 1939.

Assuming, therefore, as I am prepared to assume, that the original order postulated a licence in writing, nevertheless it could be varied without any formality or publicity. The circular letter of June 22, 1942, is cogent evidence that it was so varied. That letter issued from the Admiralty, and it showed clearly that licensing officers were authorized to grant oral permission for repairs pending the actual issue of a licence. It seems to me quite plain that that letter could not, or at any rate should not, have been circulated unless the original order had been varied so as to enable oral permission to be given. In these circumstances in point of law I think that this court should presume that it had been so varied. If there was ever a case in which the maxim omnia praesumuntur rite esse acta should apply, it is this case, because licensing officers, ship repairers and shipowners have assumed throughout that oral permission could validly be given. Every reasonable presumption should be made to support their action rather than it should be held that all of them have over all these years been acting illegally.

Let me assume, however, that I am wrong about this, and that we ought not to presume that the original order had been varied. Nevertheless, I decline to believe that the shiprepairers were guilty of any illegality. They acted on what they were told by the licensing officer. They did not know what orders had actually been made by the Admiralty, or what variations had been made in them. They had no means of knowing the orders, or at any rate they had no sure means, because the Admiralty were not bound to publish them. They could only rely on what they were told by the licensing officer. Can it be seriously suggested, that, having relied on him, they have been guilty of an offence? In my judgment, there is a principle of law which protects them from such an injustice. It is a principle of particular importance in these

(1) 64 T. L. R. 481.   (2) [1948] 1 K. B. 349, 370.

days when the officers of government departments are given much authority by orders and circulars which are not available to the public. The principle is this: whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume. He does not know and cannot be expected to know the limits of their authority, and he ought not to suffer if they exceed it. That was the principle which I applied in *Robertson* v. *Minister of Pensions* (1), and it is applicable in this case also. It was not canvassed in *Jackson, Stansfield & Sons* v. *Butterworth* (2), and that case is therefore no obstacle to its adoption.

In my judgment, therefore, these ship-repairers were guilty of no illegality, and their claim is not to be defeated on that account. The appeal should be allowed and it should be declared that the defences set up in paras 4 to 7 of the amended defence are not good.

SINGLETON L.J. I agree that this appeal should be allowed. It is right that I should give my reasons for coming to that conclusion, in view of the fact that we are differing from the official referee, who took great trouble with the case and who stated his findings with admirable clarity. The question before the court arises from the defendant's plea in the amended defence that the repairs or alterations executed by the plaintiffs before October 11, 1947, were illegal, and that consequently the plaintiffs are not entitled to recover the cost of them from the defendant. This plea is based on the principle stated by Somervell L.J. (citing Lord Ellenborough) in *Bostel Bros.* v. *Hurlock* (3): "What is done in contravention of the provisions of an Act of Parliament cannot be made the subject "matter of an action." The relevant order is the Restriction of Repairs of Ships Order, 1940.

The defendant says that the plaintiffs had no licence to do the repairs or alterations at the time they (or the greater part of them) were done, and that the doing of them without a licence granted by the Admiralty was in contravention of the order. It is for the defendant to establish this, and he seeks to do so by saying that the word "licence" in the order means "written licence," and that it is common ground that the plaintiff did not have a written licence until October 11, 1947,

(1) [1949] 1 K. B. 227.
(2) 64 T. L. R. 481.
(3) [1949] 1 K. B. 74, 79.

whereas work to the value of 4,000*l.* or thereabouts was done before that date. Thus the question depends on whether " licence " in the order ought to be read, or must be read, as meaning " written licence." Prima facie he who sets up that a criminal offence has been committed must prove it, and yet I do not think that anything really turns on onus of proof in this case. At the same time that question of construction cannot be determined without regard to the attendant circumstances and to the exigencies of the times at the date of the order. Perhaps I should say that one is entitled to bear those matters in mind, if there be ambiguity, as I think there is: see *Watcham* v. *Attorney-General of the East Africa Protectorate* (1).

On behalf of the defendant reliance was placed on the decision of this court in the case of *Jackson, Stansfield & Sons* v. *Butterworth* (2), in which the court (by a majority) held that the words " a licence granted by the Minister " in reg. 56A (2) of the Defence Regulations, 1939, meant a licence in writing; and it was submitted that that decision covered the present case.

It is right to point out that Jenkins J., in the course of a dissenting judgment, said that he was unable to find anything in reg. 56 A which constrained him to construe art. 2 of that regulation as requiring that the licence must be in writing. He thought that the regulation should be construed strictly in favour of the subject. Regulation 56A concerns the control of building operations, and, as was pointed out by Mr. Ryder Richardson, it provides a complete code and, in particular, gives an accused person a defence under art. 6, proviso (*a*) if he had reasonable grounds for believing that the cost would not exceed the amount stated, and under art. 6 proviso (*b*) if the acts done without authorization or licence were urgently necessary and were done in circumstances of emergency which rendered it impracticable to obtain authorization of them or a licence for them. There is nothing of this kind in the order now under consideration, which was made by virtue of reg. 55, of the Defence Regulations, 1939, which provides that orders may be made for the general control of industry. And how different is the subject matter ! Regulation 56A, as I have said, provides a code for the control of building operations, and building operations are seldom a matter of extreme urgency. Ship repairs, on the other hand,

(1) [1919] A. C. 533.

(2) 64 T. L. R. 481.

must often be done immediately, sometimes to keep a ship afloat, and in war-time because of the urgent need for all available shipping ; and, again, no one can tell the extent of the repair necessary until he has begun the repairs. In such cases it would be hampering the efforts of those who were endeavouring to keep shipping afloat and active to say that no repairs can be done by ship repairers without a written licence.

It may well be possible for the ship repairer to see, or to speak by telephone to, the proper authority (in this case the ship surveyor) and to obtain oral authority or licence to do what is necessary, it being understood that the surveyor would give a written licence at some later stage after he had inspected the ship. Only thus was the order workable, as I think. If I am right in this view, what is given in the first instance in such a case is an oral licence. In the normal case it is followed by a written licence, which is important for purposes of record, if for no other purpose. If it were otherwise, the ship repairer would be committing an offence every time he did a small repair to keep a ship afloat unless he had a licence in writing which, it may be, could not be obtained in time to be of use, and which the surveyor might refuse to give until he had inspected. The order ought not to be read in that way unless it be necessary so to read it.

Moreover, the practice is shown by the letter from the Admiralty of June 22, 1942, signed by the Director of Merchant Ship Repairs. Paragraph 3 of that letter reads : " On the " other hand, I understand that it has been made clear to you " that where you are dealing with reliable ship-repairers and " owners with a good record, you ought not to delay the " putting in hand of obvious repairs merely pending the " actual issue of a licence." This I take to mean : you may give an oral licence to reliable ship-repairers (as the plaintiffs were) pending the giving of a written licence. To read it in any other way would be equivalent to saying that the department encouraged the licensing officer to aid and abet the ship-repairers in committing offences against the order. I do not see that, on this wholly different subjectmatter and under a different order and regulation, we are bound by the decision in *Jackson, Stansfield & Sons* v. *Butterworth* (1). I agree with what Asquith L.J. there said, that normally in considering a licence granted by the Minister (or by the Admiralty), one thinks of a written instrument; but that does not mean that an oral licence can never be a licence within the meaning of the word "licence" in a statutory order. This case must be decided upon a fair view of the order itself, regard being had to that with which it was concerned.

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(1) 64 T. L. R. 481.

Everything in the way of alterations or repairs was done to the ship under the eye of the licensing officer, a surveyor of ships under s. 724 of the Merchant Shipping Act, 1894, and the licensing authority under the Admiralty. Incidentally, that officer is a Board of Trade surveyor, and at the time he was also the Ministry of Transport's senior surveyor at Falmouth. He said in evidence that he inspected the work from time to time, and that no unauthorized work was done—there were no authorized repairs. In other words, he had given an oral licence for all that was done. Written application had been made on Form M.S. 4 on February 3, 1947. Some 4,000*l.* worth of work was done under oral licence. A further application to complete Board of Trade requirements for modified steam 3 certificate was made on October 7, 1947, and this was authorized, and a written licence given on October 11, 1947.

In view of the evidence, I do not think that it can be shown that the repairs, etc., were carried out without a licence granted by the Admiralty: the oral licences given from time to time were sufficient. In considering the authority of the licensing officer, one must look at the letter of June 22, 1942, from the department of the Admiralty dealing with these matters, as well as at the documents referred to by the official referee.

Certainly I am not prepared to say that there was any contravention of the order by the plaintiffs. It is interesting to consider what would be the direction to the jury if, on these facts, there were a committal for trial. Mr. Havers submitted that it would be the duty of the judge to direct the jury that "licence" in the order means "written licence"; and, it being admitted that a great part of the repairs was done without a written licence having been first obtained, it would be the duty of the judge to direct the jury to convict. I am not disposed to take that view. I regard the word "licence" in the order as capable of meaning either a written or an oral licence. I think it would be the duty of the judge in such a case to point out to the jury that, though "a licence granted "by the Admiralty" would normally connote a written instrument, it need not of necessity bear that meaning if it were capable of another meaning and if so to read it would make the carrying out of urgent repairs in war-time impossible without committing a breach of the order. After all, common sense must apply to construction, and if there are two possible meanings of the word the one which makes sense of the order and renders its working practically possible should be given.

In other words, I do not think that the judge would be right if he directed the jury to convict. It would be for them to say whether there was a licence in fact; and I have no doubt what their answer would be—indeed, it is more than likely that the case would not get so far. It is impossible to think of the Admiralty prosecuting in circumstances such as these. The defendant, in an effort to escape paying for work which has been done for him, sets up a plea of illegality on the part of the plaintiffs. For the reasons I have given, I consider that this is a bad plea, and I would allow the appeal.

BUCKNILL L.J. I agree that this appeal should be allowed. The main question at issue seems to me to lie in a small compass: did the plaintiffs commit an unlawful act when they started work on the ship in question for the purpose of altering her from an armed motor vessel to a passenger ship? I need not set out the facts, which have been fully stated. The result of the conversations between the plaintiffs and the licensing officer was, to quote from the judgment of the official referee: "They, the plaintiffs, pro-
"ceeded with the work on the oral permission of . . . .
"the licensing officer. The officer and his assistant inspected
"the work as it was being carried out, and if any work
"was being done which was not permitted, they could
"and would have stopped it. They inspected the work three
"or four times a week. In their official capacity the
"officer and his assistant gave the plaintiffs instructions
"to carry out certain work which the Board of Trade would
"require, and the plaintiffs complied with their instructions."

Can it be said in these circumstances that this work, which was done by the plaintiffs before October 11, 1947, when the written licence was granted by the licensing officer, was illegal because it contravened the order issued by the Lords Commissioners of the Admiralty on February 1, 1940? The answer to that question seems to me to turn on the ordinary and natural meaning which a man, whose business is to repair, alter or drydock ships, would give to the words of art. 1 of the order—" a licence granted by the Admiralty ? " In my opinion these words are clearly capable of including an oral licence, and ought not to be construed as limited to a licence set out in a written, typed or printed document. I cannot think that the framers of the order intended those words to have such limitation. Take, for instance, the very simple case of the drydocking of a ship. This is a task which often can only be done at high water, that is to say, once in every twelve hours. Drydocking a ship does not involve the use of any material, other than the temporary use of the appliances of the dry dock, or of much labour. It may be that the ship is to be drydocked solely for inspection of her bottom, and will only stay in the dry dock for one tide. It may be that the drydocking is a matter of urgency. The suggestion that the order was intended to impose on the owners or users of the dry dock the duty of obtaining a formal licence in writing to drydock the ship, that an oral permission to drydock her from the representative of the Admiralty was invalid, and that a man acting on such an oral permission was doing something which might amount to a criminal offence, seems to me very unreasonable. At the time when the order was made it was just as necessary that essential work to ships should not be impeded by the necessity of obtaining formal documents as it was necessary that all shipyard facilities should be available for such work on ships as would promote the war effort of the country.

The official referee, when considering the second point made on behalf of the defendant, namely, that the written licence was automatically determined when the first of the unauthorized repairs, alterations or drydocking was carried out, said in his judgment : " If the licensing officer can " authorize repairs, alterations or drydocking by giving " oral permission for such work to be done, then there were " no unauthorized repairs and the licence was not automatically " determined." A little earlier he had said : " I am satisfied " that he (the licensing officer) gave oral permission to the " plaintiffs to do all the work." I think that in this case also an oral permission or licence was sufficient to comply with the order.

For these reasons I think that the defendant has failed to establish the plea in his amended defence that the work done by the plaintiffs for the defendant before October 11, 1947,

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was illegal and/or irrecoverable in law, and that so much of the claim as related to repairs and/or alterations carried out after October 11, 1947, was illegal and/or irrecoverable in law. I have had the opportunity of reading the judgments of Singleton and Denning L.JJ., and I respectfully agree with the reasoning in them, whereby this case is distinguished from *Jackson, Stansfield & Sons* v. *Butterworth* (1), and the different nature of this order of 1940 from the terms of reg. 56A of the Defence Regulations, 1939, is shown. There will be a declaration that the pleas set up in paras 4 to 7 of the amended defence do not disclose any defence to the plaintiffs' claim.

The case will be remitted to the official referee for trial on other issues.

Appeal allowed.

Solicitors: *Layton & Co.; Theodore Goddard & Co.*

C. G. M.

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Mar. 15, 16, 17; *Apl.* 3.
Bucknill and Asquith L.JJ., and Roxburgh J.

WHITTY AND OTHERS v. SCOTT-RUSSELL.

Landlord and tenant—Rent restriction—"House and cottage with the "garden and land thereto belonging"—Demise under one lease—Covenant by tenant to "use the premises as and for a private dwelling-"house only"—Cottage sub-let with assent of landlord—Claim to possession—Whether house and cottage let as a single dwelling-house and protected by statute—Rent & Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1—*Rent & Mortgage Interest (Restrictions) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-ss.* 1 *and* 3.

In 1937 the predecessor in title of the present plaintiffs leased to the defendant for three years, at a rent of 75*l.* a year, a dwelling-house and cottage, with the garden and land thereto belonging. The house and cottage were semi-detached, but there was no internal intercommunication. The tenant covenanted "to use the premises as and for a private dwelling-house only." He occupied the house, and, with the assent of the lessor, sub-let the cottage. At the end of the three years the tenant held over as a yearly tenant. On the death of the original lessor his executors gave the tenant notice to quit, but he did not vacate the premises, and as landlords, who had become joint owners of the property, brought this action for possession. They now appealed against the dismissal of their action by the county court judge.

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(1) 64 T. L. R. 481.

Held (1.) that, notwithstanding that the tenant did not and had never intended to occupy the cottage himself, the house and cottage were, having regard to the terms of the lease and, in particular, the covenant by the tenant to use the demised property as a dwelling-house only, let as a single dwelling and therefore constituted a dwelling-house within the definition in s. 16, sub-s. 1, of the Act of 1933.

Langford Property Co. Ld. v. *Goldrich* [1949] 1 K. B. 511, followed.

Observations of Evershed and Denning L.JJ. in *Wolfe* v. *Hogan* [1949] 2 K. B. 194, 203, 204, considered.

(2.) That, on the facts, the "dwelling-house" to which sub-s. 3 of s. 3 of the Act of 1939 had to be applied was not the house without the cottage, but the two combined; that it was together with this "dwelling-house" that the land had been let; and that the land was therefore to be considered as part of the dwelling-house, and the whole tenancy was accordingly protected.

APPEAL from Tunbridge Wells county court.

In 1937 premises consisting of a house known as Tower House, Wadhurst, and a cottage and the garden, were let by the predecessor in title of the present landlords to the defendant for three years at a rent of 75*l*. a year, payable quarterly. The house and cottage were semi-detached, but there was no internal communication between them. The garden and land extended considerably beyond the site of the house. The lease described the demised premises as "the dwelling-house "and cottage with the garden and land thereto belonging," and the tenant covenanted "to use the premises as and for "a private dwelling-house only." The tenant did not require the cottage for use as part of his own home, and, with the assent of the original landlord, sub-let it. At the end of the three years the tenant held over as a yearly tenant. On December 22, 1948, the original lessor having died, his executors, the present landlords, gave the tenant notice to quit expiring on June 24, 1949. The tenant failed to vacate the premises, and the landlords brought the present action, claiming possession of the house and cottage. On December 15 the judge dismissed the action, holding that the house and cottage

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were let as one dwelling-house within the meaning of the Rent Restriction Acts, and that the tenant was protected (1).

The landlords appealed.

John Elton for the landlords. The contention of the landlords is that the Rent Restriction Acts never applied to these premises. The tenant, to succeed, has to prove that the house and cottage let to him constitute a dwelling-house within the statutory definition, which has to be found in s. 16, sub-s. 1 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and is expressed to mean the same as the corresponding definition in the Act of 1920. It is submitted that the house and cottage, the subject matter of the present action, were let as two quite separate dwellings. The tenant never required the use of the cottage and never intended to make use of it. He has never made it part of his home. He sub-let the cottage, and has always treated the premises as two distinct dwellings. The actual user is the criterion by which to judge whether the two buildings were let as one dwelling-house or as two separate dwellings.

In *Langford Property Co. Ld.* v. *Goldrich* (2) the Court of Appeal, overruling the decision of Birkett J., held that two self-contained, but not contiguous, flats in a block of flats, let together, constituted one dwelling-house within the definition in s. 16, sub-s. 1; but in that case the tenant had occupied both flats as the home of his family. Somervell L.J. there said (3): "In my opinion, if the facts justify such a "finding, two flats or, as far as I can see, two houses could be "a separate dwelling-house within the meaning of the "definition." The facts of the present case do not justify such a finding. It would be a startling proposition if a man could rent four cottages, reside only in one and sub-let the other three, and then claim to be protected by the Rent Restriction Acts on the ground that he was the tenant of the whole four let to him as a separate dwelling.

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16, sub-s. 1: "'Dwelling-"'house' has the same meaning "as in the principal Acts, that "is to say, a house let as a "separate dwelling or a part of "a house being a part so let."

Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 3: ". . . . for the pur-"poses of the Rent and Mortgage "Interest Restrictions Acts, 1920 "to 1938, as amended by virtue "of this section, any land or "premises let together with a "dwelling-house shall, unless the "land or premises so let consists "or consist of agricultural land "exceeding two acres in extent, "be treated as part of the "dwelling-house, but, save as "aforesaid, the principal Acts "shall not, by virtue of this "section, apply to any dwelling-"house let together with land "other than the site of the "dwelling-house."

(2) [1949] 1 K. B. 511.

(3) Ibid. 517.

Assuming, however, that the house and cottage constituted a separate dwelling-house, it is submitted that it is not a dwelling-house to which the Rent Restriction Acts apply. They can only do so, if at all, by virtue of the Act of 1939. Section 3, sub-s. 1 applies the Acts, " subject to the provisions " of this section." Sub-section 3 provides that " any land or " premises let together with a dwelling-house shall, unless the " land or premises so let consists or consist of agricultural " land exceeding two acres in extent, be treated as part of the " dwelling-house ; but, save as aforesaid, the principal Acts " shall not, by virtue of this section, apply to any dwelling-" house let together with land other than the site of the " dwelling-house." This is a dwelling-house let together with land other than its site. It is therefore excluded by the concluding words of sub-s. 3, for the word " premises " in " premises let together with a dwelling-house " in the earlier part of the sub-section must be read as " premises " which are themselves not a dwelling-house or capable of " being a dwelling-house": see per Cohen L.J., in *Langford Property Co., Ld.* v. *Batten* (1). In any event the landlords are entitled to possession of the cottage. [*Rider* v. *Rollit* (2) ; *Amphlett* v. *Dorrell* (3) ; *Vaughan* v. *Shaw* (4) ; *Read* v. *Goater* (5) ; *Stanton* v. *Laws* (6) ; *Murgatroyd* v. *Tresarden* (7); *Skinner* v. *Geary* (8) ; and *Cow* v. *Casey* (9) also referred to.]

John Stephenson for the tenant. The county court judge came to a right decision. There is evidence, in the terms of the lease and the layout of the premises, on which he was entitled to find that this was a letting of one dwelling-house, together with the garden and land belonging to it. It would be surprising if a man in the position of the tenant, who rented a house and cottage of a total rateable value well within the protection of the Rent Acts, and in which he lived for two years before the Act of 1939 came into force, should find

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(1) (1949) 65 T. L. R. 577.
(2) (1920) 36 T. L. R. 687.
(3) [1949] 1 K. B. 276.
(4) [1945] K. B. 400.
(5) [1921] 1 K. B. 611.
(6) [1934] W. N. 193.
(7) [1947] K. B. 316.
(8) [1931] 2 K. B. 546.
(9) [1949] 1 K. B. 474.

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himself expelled by order of the court some ten or eleven years later. It is only by a strained interpretation of sub-s. 3 of s. 3 of the Act of 1939 that such a result could be reached. The landlords rely entirely on one passage in the judgment of Cohen L.J. in *Langford Property Co. Ld.* v. *Batten* (1) for the proposition that premises and land let with the Tower House are not premises and land let together with it, because the cottage is itself capable of being a dwelling-house. It is submitted that the passage in question is obiter dictum, and that it is possible to find a more natural interpretation of the word " premises." The legislature cannot have intended to narrow down the added premises to something not capable of being used as a dwelling-house. " Premises " presumably is to be given its natural and ordinary meaning, and it is for the landlords to establish that the context requires some other meaning.

Primarily the question is whether there was evidence on which the judge could find that the cottage was let together with the house. The court is entitled to look at the lease to ascertain what is the purpose of the letting. " If the lease " contains an express provision as to the purpose of the " letting, it is not necessary to look further " : per Denning L.J. in *Wolfe* v. *Hogan* (2). It may be that there has been such a change in the use of the premises that at the material time, when possession is claimed, the house ceases to be within the protection of the Acts ; but in the present case there has been no change at all. Both the question under s. 16, sub-s. 1 of the Act of 1933 and that under s. 3, sub-s. 3 of the Act of 1939 are questions of fact and degree, and the facts justify the findings of the county court judge.

Cur. adv. vult.

Apr. 3. ASQUITH L.J., reading the judgment of the court, stated the facts and continued : Throughout the lease " the " premises "—a phrase constantly recurring—means an amalgam or conglomerate which includes either all three components —dwelling-house, cottage and garden—or at least the house and cottage, as in the case of the covenants to repair and to use as a private dwelling-house only. The county court judge, in a very short judgment on the agreed facts, says : " I held " the tenant was a protected tenant of the premises comprised " in the tenancy agreement, although the cottage had been

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(1) 65 T. L. R. 577.

(2) [1949] 2 K. B. 194, 204.

"sublet by him from the start . . . . I accepted the tenant's "contention that the house and cottage were one dwelling-"house within the meaning of the Rent Restriction Acts. "The case seemed to me governed by the judgment of "Somervell L.J. in *Langford Property Co. Ld.* v. *Goldrich* (1). "An additional ground of defence is afforded by s. 3 (3) of "the 1939 Act: see *Langford Property Co., Ld.* v. *Batten* (2)."

At the trial the onus was on the tenant to establish that the Rent Restriction Acts protected him. This involved proving two things: (1.) that the complex let to him was a "dwelling-"house" within the relevant statutory definition, and, (2.) that it was a "dwelling-house to which the Rent "Restriction Acts apply." The county court judge evidently held that the tenant had established both propositions, as he had to in order to succeed. The appellant landlords allege that neither has been established.

We will examine each of them in turn: (1.) was the "complex" let a "dwelling-house"? The material definition of a dwelling-house for the present purpose is that contained in s. 16, sub-s. 1 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. This definition is expressed to mean the same as the corresponding definition in the Act of 1920, though the language of the Act of 1933 is slightly different, and runs as follows: "A house let as a separate dwelling, "or a part of a house, being a part so let." In the present case, is what is let "a house" or two houses, and is it let as a "separate dwelling" or as two separate dwellings? Or is only part of it let as a separate dwelling?

The main authority relied on by the tenant on this issue is *Langford Property Co., Ld.* v. *Goldrich* (1). That was a case in which two flats, not contiguous but forming part of the same block of flats under a single roof, were held to be a "dwelling-house" within the definition. Somervell L.J., in a judgment with which the other two members of the court concurred, says (1): "In my opinion, if the facts justify "such a finding, two flats, or indeed so far as I can see two "houses could be a separate dwelling-house within the meaning "of the definition."

The Lord Justice, if he had wished to adhere precisely to the terms of the definition, would have said "two houses" could be "a house let as a separate dwelling," and therefore

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(1) [1949] 1 K. B. 511. (2) 65 T L. R. 577.

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a "dwelling-house." He appears to base this conclusion partly on the terms of the lease, under which the subject-matter let is expressed to be two flats; partly on the Interpretation Act, whereby the singular prima facie includes the plural, hence "house" in the definition includes houses; but partly also (in relation to the part of the definition which reads "let as a separate dwelling") on the fact that the tenant in that case wanted the two flats as a home for his family or its overflow, which one flat would have been unable to accommodate.

If the Interpretation Act alone were concerned, this reasoning would be open to the comment that, if the inclusion of the plural in the singular permitted us to read "house" as including houses, it would equally permit (or perhaps require) us to read "let as a separate dwelling" as including "let as "two separate dwellings." An impartial application of the Interpretation Act might lead to odd results.

It is unnecessary, however, to speculate on this, since we are bound by the decision in *Langford Property Co., Ld.* v. *Goldrich* (1), of which this was part of the ratio decidendi. It enables us to read "house" as covering two houses. But is this (composite) "house" in the present case "let as a "separate dwelling"? In *Langford Property Co. Ld.* v. *Goldrich* (1), the tenant's purpose in taking two flats was that his family should occupy both, as in fact they did. "What "happened here," says Somervell L.J. (2), "was that the "tenant wished to accommodate in his home these relatives "to whom I have referred, and he wanted more accommodation "than could be found or conveniently found in one flat. "He . . . . thereupon took the two flats and made those "two flats his home." It would seem that the circumstance that the tenant intended to make the two flats—the totality of the parcels let—his home, was thought material, and indeed necessary, by Somervell L.J., to his decision that the flats were let "as a separate dwelling." If the flats had been let to the tenant, one to be dwelt in by him and his family, the other not to be so dwelt in, the decision might, it appears, have been different. In the present case the tenant only took the cottage along with the house because the lessor refused to let the one without the other. He never lived in, and never from the start intended to live in, the cottage.

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(1) [1949] 1 K. B. 511.

(2) Ibid. 517.

It is, however, argued in answer to this objection that the Court of Appeal, in certain of its decisions of which the most recent is *Wolfe* v. *Hogan* (1), has held that, where there has been a formal instrument of letting, the terms of which express the purpose for which the premises were let, this is conclusive, and evidence of any other purpose derived from, for example, the actual use, is excluded. In that case, Denning L.J. used language which lends strong colour to such a contention when he said, in the opening sentences of his judgment (2): "In "determining whether a house or part of a house is 'let as "'a dwelling' within the meaning of the Rent Restriction "Acts, it is necessary to look at the purpose of the letting. "If the lease contains an express provision as to the purpose "of the letting, it is not necessary to look further. But, if "there is no express provision, it is open to the court to look "at the circumstances of the letting," and so on. In that case there was no express provision in the lease as to the "purpose": in the present case the tenant expressly covenanted to use the premises as "a private dwelling-house "only"; and if Denning L.J.'s proposition is to be taken as both authoritative and unqualified, it clinches the tenant's argument.

Evershed L.J. in the first judgment appears to accept this view, though whether with some, and if so what, qualifications is a question which must be explored. Bucknill L.J. gave no reasons, but simply agreed with the judgment of Evershed L.J.

Evershed L.J. (3), cited *Gidden* v. *Mills* (4), and the following passage among other passages from judgments of the Court of Appeal, "the important matter is the rights under the "lease, not the de facto user": *Barrett* v. *Hardy Bros. (Alnwick) Ld.* (5). "If an agreement were to let premises "as a barn the tenant, though he lived there, could not be "heard to say that they were let as a dwelling-house" (per Bankes L.J., in *Epsom Grand Stand Association* v. *Clarke* (6). He then goes on to approve this passage from Mr. Megarry's book on the Rent Restriction Acts (4th ed.), p. 19: "Where "the terms of the tenancy provide for or contemplate the use "of the premises for some particular purpose, that purpose "is the essential factor, not the nature of the premises or the "actual use made of them. Thus, if premises are let for

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(1) [1949] 2 K. B. 194.
(2) Ibid. 204.
(3) Ibid. 202, 203.
(4) [1925] 2 K. B. 713.
(5) [1925] 2 K. B. 220, 227.
(6) [1919] W. N. 170.

"business purposes, the tenant cannot claim that they have "been converted into a dwelling-house merely because some- "body lives on the premises." Mr. Megarry goes on to say that actual user at the time when possession is claimed must be considered where the tenancy agreement contemplates no specified use.

The only qualification annexed to this general statement by Evershed L.J., is contained in a passage lower down on the same page (1): "Again I wish to make it quite plain that "I am saying nothing which should be taken as indicating "that if a tenant does change the user and creates out of "what was formerly a shop a dwelling-house, and if that fact "is fully known to and accepted by the other party to the "contract, whether or not there is a prohibition, the result "may not very well be that there will then be inferred a con- "tract to let as a dwelling-house, although it may be a different "contract in essentials from the contract which was originally "made and expressed."

In other words, where the original contract was for a particular user, but by the time the plaint is issued has been superseded by a subsequent contract providing for a different user, the subsequent contract may be looked to in deciding whether the premises are let as a "dwelling" or "separate "dwelling." This qualification (which was obiter in *Wolfe* v. *Hogan* (1)) does not apply to the facts of the present case, in which there have not been two successive contracts providing for different users; and the principle is asserted without any such qualification in earlier decisions of the Court of Appeal.

In these circumstances, we are of opinion that the complex "let" in this case was a dwelling-house within the definition, and we are fortified in that opinion by the concession, in argument, that if X. took a tenancy of a house consisting of, say, three floors, and sub-let one floor at once and permanently, the fact of the sublease would not deprive the subject-matter of the head lease of its character as a dwelling-house, provided that in other respects it possessed that character. It cannot in our view make a crucial difference that in the case supposed the part sub-let and the part not sub-let possess internal intercommunication through the common stair, whereas in this case the two units, one of which is sub-let, are two houses clamped together and without such internal intercommunication. Indeed,

(1) [1949] 2 K. B. 194, 203.

the judgment of Somervell L.J., in *Langford Property Co. Ld.* v. *Goldrich* (1) appears to decide that two houses, even if wholly detached, can be " a house " within the definition ; and *Barrett* v. *Hardy* (2), *Epsom Grand Stand Association* v. *Clarke* (3), and, as we read the case, *Wolfe* v. *Hogan* (4) decide that " a house " expressed in the contract of tenancy to be let " as a private dwelling-house " is none the less a house " let as a dwelling " and a " separate dwelling," because one of its components was sub-let from the start.

We would only add to the authorities cited one more quotation from Mr. Megarry's book (5th ed.), pp. 35–36 : " Meaning " of ' dwelling ' . . . . It seems to be immaterial whether " the person who dwells on the premises is the tenant or his " sub-tenants," though, of course, the tenant loses the protection of the Acts if he sub-lets the whole of the premises and moves out. For these reasons we conclude that the subject-matter of the head lease was a " dwelling-house " within the definition in s. 16, sub-s. 1.

(2.) The other question is whether that subject-matter was not only a " dwelling-house " but a dwelling-house " to which " the Acts apply " ? It is common ground that if the Acts apply at all, they can only do so by virtue of the Act of 1939. Section 3, sub-s. 1 of that Act applies the Acts to this " dwelling-" house " " subject to the provisions of this section." The provisions of the section are, so far as material, those contained in the latter part of sub-s. 3. This provision reads as follows : " . . . . and for the purposes of the Rent and Mortgage " Interest Restrictions Acts, 1920 to 1938, as amended by " virtue of this section, any land or premises let together with " a dwelling-house shall, unless the land or premises so let " consists or consist of agricultural land exceeding two acres " in extent, be treated as part of the dwelling-house ; but, " save as aforesaid, the principal Acts shall not, by virtue of " this section, apply to any dwelling-house let together with " land other than the site of the dwelling-house."

It has been strenuously argued for the landlords that this sub-section excludes the dwelling-house here in question from the operation of the Rent Restriction Acts. The argument is (1.) that, this being a dwelling-house let together with land other than its site, the concluding words of the sub-section exclude it, unless the conditions in the preceding limb of the

(1) [1949] 1 K. B. 511.
(2) [1925] 2 K. B. 220.
(3) [1919] W. N. 170.
(4) [1949] 2 K. B. 194.

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sub-section are satisfied (" save as aforesaid ") ; (2.) that these conditions are not satisfied, since, although the cottage is let together with the house, the cottage is not " premises " let together with a dwelling-house " because " premises " must here be read as premises which are themselves not a dwelling-house or capable of being a dwelling-house. The argument relies, as regards the last link, on a passage (admittedly an obiter dictum) from the judgment of Cohen L.J. in *Langford Property Co. Ld.* v. *Batten* (1), on the decision in *Read* v. *Goater* (2), and on the wording—in this respect similar—of s. 12, sub-s. 2 (iii) of the Act of 1920.

This argument, which impressed us at the time, seems on reflexion to rest on a misconception as to what, on the facts of this case, is the " dwelling-house " to which sub-s. 3 has to be applied : this is not the house without the cottage, but the two combined. This composite dwelling-house is, prima facie, one to which s. 3, sub-s. 1 applies the Acts, " subject to the " provisions of the section," namely, sub-s. 3.

Sub-section 3 does nothing to displace the application of the Acts if the word " dwelling-house," when it occurs in the sub-section, is read as the complex constituted by house plus cottage. If it be so read, this is a case where " land " (not premises) is " let together with a dwelling-house," and the sub-section provides that in that event the land (though considerably exceeding the area of the site) is to be treated as part of the dwelling-house and shares any immunity conferred on the latter by s. 1.

The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors : *Fladgate & Co., for Sir Robert Gower, Tunbridge Wells ; Lee, Ockerby & Co., for Buss, Bretherton and Murton-Neale, Tunbridge Wells.*

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(1) 65 T. L. R. 577.

(2) [1921] 1 K. B. 611.

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SHEARMAN *v.* FOLLAND.

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Jan. 24, 25; *Apl.* 5.

Tucker and Asquith L.JJ., and Roxburgh J.

Negligence—Personal injuries—Special damage—Injured person ordinarily residing in hotels—Whether saving on hotel charges deductible against fees of nursing homes.

The plaintiff, an elderly woman, was knocked down and injured by the defendant's motor car driven by his servant. The negligence of the driver was not disputed and liability was admitted by the defendant. The plaintiff had been accustomed to live in hotels, where she paid seven guineas a week for her board and lodging. The trial judge, in assessing the special damage, took into account, as against the fees for nursing homes for fifty-five weeks, the saving of seven guineas which but for the accident she would normally have paid for hotel board and lodging. On appeal:

Held, (1.) that the defendant was not entitled to deduction in respect of the seven guineas a week which the plaintiff would or would probably have spent on hotels if not injured, the precise style in which she would probably have lived being a collateral matter, and hotel charges and nursing home fees not being in pari materia. (2.) That if evidence had been adduced to show what proportion of the twelve guineas a week paid to the nursing homes was attributable to board or lodging it would have been open to the judge to make a deduction in respect of them; and that, in the absence of such evidence, the court, acting as a jury, would deduct from the nursing home fees 1*l.* a week in respect of food.

APPEAL from Slade J.

The plaintiff, a woman then 67 years of age, was in August, 1946, knocked down by a motor-car driven by a servant of the defendant, and very severely injured. As a result of the accident one leg had to be amputated at the thigh and the other became permanently unstable and in practice largely useless. She was described as having been "healthy, active "and young for her age," but she was now unable to walk more than 150 yards, and that only on a perfectly even surface. She was also unable without assistance to go up or down stairs, get into or out of a bath, or into or out of a motor-car. She spent some fifty-five weeks in nursing homes, the fees charged averaging twelve guineas a week exclusive of fees for operations, use of theatre, etc. As a result of the accident she had to have a permanent attendant, and in respect of that she claimed as general damages ten guineas a week for a period equal to her expectation of life, namely eight or nine years. Before the accident the plaintiff had been in the

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habit of residing in hotels, and, in particular, in one where she paid seven guineas a week for board and lodging. The judge awarded the plaintiff 5,234*l*. 17*s*. 10*d*., being as to 4,500*l*. general damages and as to 734*l*. 17*s*. 10*d*. special damages. In arriving at those figures he took into account as against the fees for the nursing homes the saving to the plaintiff, while in the nursing homes, of her hotel charges, and he drastically reduced the general damages claimed in respect of the board and lodging of the personal attendant.

The plaintiff appealed on the grounds that the award was inadequate and that the deductions were not justified.

F. S. Laskey K.C. and *Neil Lawson* for the plaintiff. The deduction made by the judge in respect of possible or probable saving of hotel charges was wrong in principle. The courts will not pursue beyond certain limits a speculation as to what would have been the position of a plaintiff if his rights had not been invaded: see *Billingham* v. *Hughes* (1). In *Liffen* v. *Watson* (2) a domestic servant was held entitled to recover the free board and lodging which she had lost owing to the defendant's tort, notwithstanding that during her disablement she had lived with her father without payment. A plaintiff is not limited in damages recoverable to the expenses of which he is out of pocket. There appears to be no reported case in which the principle contended for by the defendant has been applied. It would involve many most complicated considerations. The utmost that could be deducted from the hospital fees is what is attributable to maintenance, but there is no evidence on which that could be assessed. Nor is there any evidence which entitled the judge to take the view that the cost of the nurse attendant was unreasonable.

John Thompson for the defendant. In principle the deduction made by the judge of the hotel charges saved was clearly right. It is understandable that there is no reported authority, because in most cases the amount involved would be quite inconsiderable. The exceptional circumstances in the present case make the point worthy of argument. The court must look at the nett increase in the plaintiff's expenditure which is referable to the accident. She must show, so far as special damage is concerned, that she has been put to excess expenditure, and she must quantify that expense.

(1) [1949] 1 K. B. 643.
(2) [1940] 1 K. B. 556.

It was the duty of the plaintiff to mitigate the damages by giving up the hotel flat while she was in nursing homes; and she is entitled to recover as special damage only the extent by which the cost of her maintenance in hospital or nursing homes exceeds her normal cost of maintenance in hotels.

Whether the ten guineas a week claimed for the salary, board and lodging of the nurse-attendant was reasonable was entirely a matter for the judge.

Cur. adv. vult.

April 5. ASQUITH L.J., reading the judgment of the court, stated the facts and continued: We will consider the two points raised in turn. First as to the deduction from the special damage of hotel living expenses, treated as saved during the plaintiff's sojourn in the various nursing homes. The defendant argues that in the absence of the accident the plaintiff would presumably have had to have been boarded and lodged somewhere, and that probably she would have continued residing at the Montana or some similar hotel, paying seven guineas a week, or some similar sum. This expenditure the accident has obviated. The actual loss caused by the accident is all that can be recovered as special damages; and that actual loss (so the argument runs) is not the gross nursing-home fees but the difference between those fees and the hotel bills which she would otherwise have incurred. That is to say, not, to take the figures above, twelve guineas a week but twelve minus seven guineas. This contention the judge accepted, as has been seen, and reduced the special damages accordingly, with this qualification, very reasonably conceded on the part of counsel for the defendant, that it was right to spread the deduction not over the whole fifty-five weeks, but over forty-five, since some margin of time must reasonably be allowed to the plaintiff to make up her mind whether to release herself from her contract with the Montana Hotel after the accident, and to make arrangements for re-engaging her rooms there on her recovery.

The contrary argument for the plaintiff may be introduced by a quotation from Mayne on Damages (11th ed.) p. 151, in a passage where the learned editor is considering what evidence is allowed in mitigation of damages to arrive at the actual damage directly resulting from the defendant's act: "Matter completely collateral, and merely res inter alios acta "cannot be used in mitigation of damages." The plaintiff contends that the hypothetical hotel expenses are matters "completely collateral." It is easier to formulate this maxim than apply it. What in a given case is, and what is not, "collateral"? Insurance affords the classic example of something which is treated in law as collateral. Where X. is insured by Y. against injury which comes to be wrongly inflicted on him by Z., Z. cannot set up in mitigation or extinction of his own liability X.'s right to be recouped by Y. or the fact that X. has been recouped by Y. *Bradburn* v. *G.W.R.* (1); *Simpson* v. *Thomson* (2). There are special reasons for this. If the wrongdoer were entitled to set off what the plaintiff was entitled to recoup or had recouped under his policy, he would in effect be depriving the plaintiff of all benefit from the premiums paid by the latter, and appropriating that benefit to himself.

The appellant plaintiff might have invoked in support of her contentions the judgment of the Court of Common Pleas in *Jebsen* v. *East and West India Dock Co.* (3). In that case the plaintiffs—owners of a ship—"ship A"—claimed damages from the defendants for delaying its departure in breach of contract, whereby passengers had cancelled their passages and the shipowners suffered loss. As the result, however, of the defendant's breach another ship—"ship B"—in which some of the plaintiffs owned shares, was benefited by getting an increase of passengers, consisting of some persons who had had to cancel their passage by the first-named ship. This was held to be no ground for reducing the damages. The case was somewhat complicated by the fact that the persons who lost on "ship A" were not exactly coincident with the persons who gained on "ship B"; and by other circumstances. But it is clear that the court would have reached the same conclusion if there had been a single plaintiff owning both ships.

Another case in which accidental de facto recoupment of part of the loss caused by the wrongdoer was ignored was *Liffen* v. *Watson* (4). It is a case of some interest in the present connexion, since the expenses involved were those of board and lodging. The plaintiff, a domestic servant before the accident, had been paid by her employer £1 a week wages and furnished with board and lodging free. After the accident had precluded her from remaining in service she went to live

(1) (1874) L. R. 10 Ex. 1.

(2) (1877) 3 App. Cas. 279, 285.

(3) (1875) L. R. 10 C. P. 300.

(4) [1940] 1 K. B. 556.

with her father, to whom she paid nothing in respect of the board and lodging which he supplied. It was held that she had none the less lost, owing to the defendant's tort, the free board and lodging previously supplied by her employer, because she had acquired its equivalent aliunde; and that she could claim for it without deduction or set off. The case resembles that of *Jebsen* v. *West and East India Dock Co.* (1).

Strange results might certainly follow if it were possible in every case for the defendant to mitigate damages by proving what course of conduct the plaintiff would probably have followed, or what his expenses would probably have been, if the act complained of had never been committed. A millionaire, accustomed to live at a palatial hotel, where his weekly expenses far exceed the charges of the nursing home to which, after being injured by the defendant's negligence, he is transplanted, would recover nothing by way of special damage. Could it really lie in the mouth of the wrongdoer in such a case to say: "I am entitled to go scot-free; I have, by my negligent act, not merely inflicted no loss but conferred a net financial benefit on the plaintiff by saving him from the consequences of his habitual extravagance"?

Apart from such an anomaly, it is clear that the court will not pursue beyond certain limits a speculation as to what would have been the position or conduct of the plaintiff if his rights had not been invaded. For instance, in the recent case of *Billingham* v. *Hughes* (2) a doctor was negligently run down and claimed as part of his special damage loss of what he would probably have earned but for the injuries received. He was awarded a lump sum, based on estimated earnings, without any deduction in respect of income tax or surtax. Although a year after receiving the income he would in fact have had to pay income tax, and two years after receiving it, surtax, upon or measured by such income, the court regarded those facts as collateral to the damage; what he would have done in respect of his earnings if he had realized them was no concern of the wrongdoer who had prevented him from realizing them, although the effect of ignoring the factor might be, and was, to give the plaintiff more than an indemnity.

Another illustration of the same tendency is that given by Lord Halsbury L.C., in his speech in *The Mediana* (3): "What "right has a wrongdoer to consider what use you are going

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(1) L. R. 10 C. P. 300.
(2) [1949] 1 K. B. 643.
(3) [1900] A. C. 113, 117.

"to make of your vessel?"—[a vessel injured in a collision]—"More than one case has been put to illustrate this: for "example, the owner of a horse, or of a chair. Supposing "a person took away a chair out of my room and kept it for "twelve months, could anybody say you had a right to "diminish the damages by showing that I did not usually "sit in that chair, or that there were plenty of other chairs "in the room? The proposition, so nakedly stated, appears "to me to be absurd."

Again, it is argued for the plaintiff that the payments to the nursing home are not in pari materia with the saving sought to be set off against them. If it were a clear case of a tort directly causing an increase of living expenses to the plaintiff, and no other sort of damage, that, it is argued, is one thing; it is quite another when the payments, against which the set-off of maintenance saved is claimed, consist (as in this case) of composite sums attributable in unascertained proportions to maintenance and nursing fees.

Finally, there appears to be no case of personal injuries in which the claim to a set-off such as is put forward in this appeal has ever been advanced, let alone succeeded. In this connexion the observations of the court in *Jebsen* v. *East and West India Dock Co.* (1), are pertinent: "The absence of "authority for a claim by defendants like this, which yet if "well founded must have arisen in many cases, affords a strong "presumption against its having any legal foundation. It is "true that there must be a first instance in every claim, and "that ingenuity often for the first time suggests a point which "has escaped observation, and which yet, when brought to "the test of argument, is found to be a sound one. But this "is a point which must have arisen so frequently that it is to "us incredible that, if sound, it never should have been taken."

What are the arguments the other way? First, it is contended that the novel character of the claim is no evidence of its invalidity if its novelty can be accounted for by factors which are consistent with its validity; and that such factors exist. The normal plaintiff in a personal-injuries case is not a migratory hotel dweller. He is a member of a household. He may himself be a householder or a lodger, a person in either case defraying his own keep and that of his family, if any; or he may be a child or dependant, supported by others. If he is a dependant, he does not save any living expenses because he incurs none. If he is a householder or lodger, many of his expenses, e.g. rent, rates and similar expenses, are fixed charges which continue while he is in hospital; while those which do not so continue and are in fact saved (e.g. those for food attributable entirely to the plaintiff's consumption) are exceedingly difficult for the defendant (who may be wholly unacquainted with the plaintiff's household arrangements) to disengage from the total and may be too trifling to make their ascertainment worth while. This may no doubt account for the invariable omission on the part of defendants to attempt set off of these items in cases of personal injury. On the other hand, in the same class of case plaintiffs do often claim for "extra nourishment" necessitated by the accident, a claim which by implication concedes that the plaintiff is claiming not a gross sum but a margin or differential and is giving credit for the nourishment—ordinary in quantity and quality—for which he would have to pay, accident or no accident.

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(1) L. R. 10 C. P. 304

So much for the absence of precedent for the appellant's claim. When the stigma of novelty is removed and the claim can be considered on its merits and (in the absence of authority) in the dry light of principle, how does it emerge from this scrutiny? The governing principle is that the damage recoverable (provided that some damage is foreseeable) is that directly attributable to the tort, and no more. The plaintiff may in certain circumstances receive less than an indemnity but (subject to the insurance cases) he should not in general receive more. The question is: what difference did the commission of the act complained of make to the plaintiff? The difference (answers the defendant) between having to pay a hotel seven guineas a week and having to pay a nursing home on the average twelve guineas a week over a period of fifty-five weeks, or thereabouts. If she had not been injured the plaintiff would not have escaped the liability to pay something for board and lodging and would probably have continued to provide for these on the scale and in the manner in which she had done so for many years past. Unless these potential payments are brought into account she makes a profit by being run down. A complicating element is, indeed, introduced by the fact that, while her hotel bills were for board and lodging only, her nursing-home fees are for these items plus nursing. Let us, for the sake of argument, think this difference away and take a simpler case in which no

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expenses are involved except those of maintenance. X. is living in town A. where bed and breakfast can be had for 10*s.* 0*d.* a night. He takes the train for town A., and in breach of its contract the railway company carries him beyond his destination to town B., where bed and breakfast cannot be had for less than 1*l.* Clearly his damages would not be 1*l.* but the difference between 1*l.* and 10*s.* 0*d.*; nor, presumably, would it make any difference if, not a breach of contract, but a tortious act had been responsible for such additional expenses. It would be the same if he had been kidnapped in town A. and dumped in town B., but for the possibility of exemplary damages which is not here in question.

On reflection it is not clear why the composite character of the payments made to the nursing home should preclude the defendant altogether from setting off living expenses of some amount from such payments. It can, of course be urged with force—and this is really a different point—that life in a hospital or nursing home, attended with pain and punctuated by operations, is a very different thing from a padded and painless existence in a hotel. But for this difference the plaintiff surely falls to be compensated under a different head —general damages, (*a*) for pain and suffering; (*b*) for loss of "amenities"; and no doubt she has been.

On this part of the case we have reached the conclusion: (1.) that the defendant cannot set off the seven guineas a week which the plaintiff would or would probably have spent on hotels if not injured. The precise style in which she would probably or might well have lived is, in our view, a collateral matter, and the two payments are not in pari materia. (2.) If evidence had been adduced to show what proportion of the twelve guineas a week was attributable to board or lodging, we think that it would have been open to the judge to make a deduction in respect thereof. In the absence of such evidence it seems to us impossible to estimate the proportion attributable to lodging; in fact, we doubt whether an expert analysis of the accounts of a nursing home would assist the court in this respect, since the charges of such an institution are not arrived at by taking into account considerations which would be reflected in the charges of an hotel or boarding house.

With regard to food the position is different: a jury would, we think, be quite entitled in such a case as this to say: "These "fees must be referable to some extent to the provision of "food. We think, in the absence of evidence as to actual

" cost, that at least 1*l*. a week should be deducted under this " head." We think that we are entitled to act in this matter as a jury would have done, and we accordingly propose to deduct the sum of 55*l*. from the amount of the special damages claimed in respect of nursing home fees.

The second point taken by the plaintiff covers the item (labelled " special damage ") attributable to the necessity, consequent on the accident, that the plaintiff should for the future have an attendant. The claim under this head is not merely that she should have an attendant, but that that attendant should live in the same hotel as the plaintiff, in a room costing the same weekly sum as the plaintiff's (namely, seven guineas) and at a minimum salary of three guineas a week (10 guineas a week in all). The judge has held that, while an attendant was necessary, (1.) the ten guineas claimed in respect of her were excessive ; (2.) the claim, relating as it did to attendance expenses not already incurred but prospective, was a claim for general and not special damage.

On the second point he was unquestionably right : all damage which up to the time of the hearing has not yet crystallized in actual disbursement is still prospective in general damages. The judge has awarded 4,500*l*. as general damages. Somewhere embedded in this figure is the prospective damage represented by the need for an attendant, along with other elements such as damages for pain and suffering, and for loss of amenities.

The fact that the plaintiff claims over 4,000*l*. for attendance alone, and has recovered only 4,500*l*. for this plus the two other and considerable items indicated, makes it quite clear that the judge has very materially reduced the attendance item. Indeed he announced his intention to scale it down in the following passage of his judgment : " She is entitled to reason- " able assistance . . . . I am not satisfied that 7*l*. 7*s*. a week " for accommodation at the same hotel as the plaintiff, plus " 3*l*. 3*s*. a week for wages, which makes 10*l*. 10*s*. a week, is " a reasonable claim against the defendant. Indeed, I think " it is entirely unreasonable, but, on the other hand, I am " satisfied . . . . that the plaintiff is entitled to recover " for the period based upon her expectation of life a sum of " money which will enable her to receive assistance of the " kind indicated in the evidence." The judge accordingly incorporates in his global figure of 4,500*l*. for general damages, a sum the precise magnitude of which we cannot gauge

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beyond saying that it must fall very considerably short of 10*l*. 10*s*. week, since, on the ten-guineas basis, this single item is 4,680*l*., leaving nothing for pain and suffering, loss of amenities, etc.

We think that the judge in drastically reducing this item must have been much influenced by the evidence as to what happened at a guest house called Westbrook House, Bampton, Devon, when at one period after her accident (September 17, 1948, to November 24, 1948) the plaintiff was looked after by the attendant whom she still has and wishes to retain, at a cost not of ten guineas but of five pounds a week, the attendant paying for her own accommodation. It is quite true that the very moderate outlay during this period of ten weeks was in part due to the fortunate accident that the attendant had a cottage in Bampton, but we cannot say that the judge was wrong if, in view of this evidence, he made a substantial, though unascertained, reduction in the figure of ten guineas a week claimed by the plaintiff.

In the result the appeal succeeds to the extent that only 1*l*. a week should be deducted from the nursing home fees instead of seven guineas.

Appeal allowed, with two-thirds costs to plaintiff.

Solicitors: *Edwin Coe and Calder Woods; P. A. Gascoin.*

A. W. G.

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JONAS *v.* ROSENBERG.

[PLAINT No. E. 483.]

Landlord and tenant—Rent restriction—Part of premises shared with sub-tenant—Statute preserving tenant's position—Act passed between date of trial and delivery of judgment—Retrospective effect—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *ss.* 9 *and* 10.

An action to recover possession of premises brought within the protection of the Rent Restriction Acts by the Landlord and Tenant (Rent Control) Act, 1949, is pending, and therefore, as decided in *Hutchinson* v. *Jauncey* [1950] 1 K. B. 574, is retrospectively affected by the latter Act, if judgment in the action is delivered after June 2, 1949, the date on which that Act came into operation, notwithstanding that judgment was reserved at the close of the hearing of the case on some day before June 2, 1949.

The landlord of premises within the Rent Restriction Acts on February 3, 1949, instituted proceedings in the county court for recovery of their possession against the statutory tenant. On May 6, by an amendment of his particulars of claim, he alleged that the tenant had sub-let part of the premises to sub-tenants whom he allowed to share the use of the kitchen with him and had therefore ceased, in accordance with the law as laid down in *Turner* v. *Baker* [1949] 1 K. B. 605, to be entitled to the protection of the Rent Restriction Acts. The hearing of the case was concluded on May 31, when the judge reserved judgment. On June 2 the Landlord and Tenant (Rent Control) Act, 1949, which extended the protection of the Rent Restriction Acts to cases where the tenant had so sub-let part of the premises, came into operation. On August 4 the judge gave judgment in favour of the landlord and made an order for possession, holding that the tenant had failed to distinguish the case from *Turner* v. *Baker* (supra) and that the Act of 1949 did not apply. On appeal by the tenant,

Held, applying *Hutchinson* v. *Jauncey* [1950] 1 K. B. 574, that the law applicable was the law as it existed at the date of the judgment, and therefore the court had no jurisdiction to make an order for possession.

APPEAL from Willesden county court.

By an agreement in writing dated October 30, 1942, between a landlord and a tenant the tenant became the lessee of certain premises. From November 9, 1946, he was a statutory tenant protected by the Rent Restriction Acts. In consequence of a statutory scheme instituted in 1945 to facilitate lettings of parts of dwellings owing to the acute housing shortage, the tenant let part of his house to sub-tenants and allowed them to share with him the use of the kitchen. On February 23, 1949, the landlord began proceedings against the tenant in the county court for an order for possession, and by an amendment of his particulars of claim on May 6 alleged that the tenant was not entitled to the protection of the Rent Restriction Acts, since, owing to the sharing of the kitchen, there was no longer a letting of premises as a separate dwelling. On May 31, 1949, the county court judge reserved judgment. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into operation. On August 4, 1949, the county court judge, delivering judgment, held that the case fell within *Turner* v. *Baker* (1) and that the Act of 1949 did not operate retrospectively so as to affect a case, such as this,

(1) [1949] 1 K. B. 605.

where the landlord's right to possession had become complete as the result of a notice to quit ending the contractual rights of the tenant before June 2, 1949, when the Act came into force. He accordingly made an order for possession.

The tenant appealed.

Moules for the tenant. The county court judge was wrong in holding that the Act was not retrospective and could not be applied. The material sections (1) of the statute are ss. 9 and 10. Having regard to the recent decision in *Hutchinson* v. *Jauncey* (2) the tenant must, it is submitted, succeed on this appeal subject to the question whether this case is distinguishable because the whole of the evidence here had been given before the Act came into force. The mere taking of the evidence cannot, however, affect the rights of the parties. Until the judgment has been delivered it cannot be said that there has been " anything done " within the meaning of those words in s. 10. [He referred to *Landrigan* v. *Simons* (3).]

Hallis for the landlord. Before the statute came into operation much had been " done " : the parties had, in effect, handed in their respective cases and asked the court for a decision on that basis. The action had ceased to be a lis pendens when the Act came into operation. The evidence had been completed on both sides, and the matter was, except in respect of the delivery of the judgment, concluded before the Act came into force.

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(1) Landlord and Tenant (Rent Control) Act, 1949, s. 9 : " Where " the tenant of any premises, " being a house or part of a house, " has sublet a part, but not the " whole, of the premises, then " as against his landlord or any " superior landlord (but without " prejudice to the rights against " and liabilities to each other " of the tenant and any person " claiming under him, or of any " two such persons) no part of " the premises shall be treated " as not being a dwelling-house " to which the principal Acts " apply by reason only—(*a*) that " the terms on which any person " claiming under the tenant holds " any part of the premises include " the use of accommodation in " common with other persons, " or (*b*) that part of the premises " is let to any such person at such " a rent as is mentioned in " proviso (1) to subsection (2.) of " s. twelve of the Increase of Rent " and Mortgage Interest (Restric" tions) Act, 1920 (which relates " to furnished lettings)."

Section 10 : " The three last " foregoing sections shall apply " whether the letting in question " began before or after the com" mencement of this Act, but " not so as to affect rent in respect " of any period before the com" mencement thereof or anything " done or omitted during any " such period."

(2) [1950] 1 K. B. 574.

(3) [1924] 1 K. B. 509.

Moules replied.

Cur. adv. vult.

Jan. 26. SOMERVELL L.J. read the judgment of the court: The first ground of appeal to be considered is thus set out in para. 3 of the notice of appeal: "That the learned judge "was wrong in law and misdirected himself in holding that "ss. 9 and 10 of the Landlord and Tenant (Rent Control) "Act, 1949, were not applicable to the facts before him." [His Lordship read them.] We are not concerned with s. 9 (*b*). The principal Acts are the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. It has been held that under those Acts such a sharing of accommodation as is referred to in s. 9 (*a*) took the house out of the protection of the Acts on the ground that it was not "let as a separate dwelling" within the meaning of s. 16, sub-s. 1, of the Act of 1933: see *Turner* v. *Baker* (1). The Act of 1949 came into force on June 2, 1949, at a time when the present proceedings before the county court judge had reached a certain stage but no order had been made.

[His Lordship stated the facts and continued:] The evidence as accepted by the judge was that the kitchen was being shared with sub-tenants to whom the tenant had sub-let part of the house. This prima facie brought the letting to the tenant within the principle of *Turner* v. *Baker* (1). Counsel for the tenant sought to distinguish this case from that on the ground that the sub-tenants here had been brought in as a result of the registration of the premises under the statutory scheme contained in Defence Regulation 65 C.B. headed "Provisions "to facilitate lettings of parts of dwellings" and continued in operation by St. R. & O. 1945, No. 1452. The tenant relied on the wording of the regulation.

At the conclusion of the hearing on May 31 the judge reserved judgment. On June 2, 1949, as stated above, the Landlord and Tenant (Rent Control) Act, 1949, came into operation. On June 23, 1949, counsel for the defendant wrote the following letter to the registrar: "Dear Mr. Registrar, "*Jonas* v. *Rosenberg*, Plaint No. E. 483. As counsel for the "defendant in the above case, in which His Honour Judge "Neal has reserved judgment, I am writing to you to point

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(1) [1949] 1 K. B. 605.

"out something which ought to be drawn to His Honour's "attention. My opponent, Lloyd-Davies, knows that I am "writing to you on this subject and I am sending him a copy "of this letter, but in deference to his suggestion I am not "writing direct to the judge. On May 30th, last, when "judgment was reserved, the Landlord and Tenant (Rent "Control) Act, 1949, had not come into force and His Honour "was given to understand that the Act would have no bearing "on the case he was trying. There is, however, more than a "possibility that Lloyd-Davies and I have unintentionally "misled the judge on this very important point, because "ss. 9 and 10 of the Act, which came into force on June 2, "appear to be retrospective in effect and to deal with the very "question which we were arguing. In these circumstances, "it occurs to me that His Honour might like this case to be "argued further before he delivers judgment. Certainly "he should not be left under a misapprehension caused by "the late publication of the statute. Copies were not on sale "at H. M. Stationery Office until after it came into force." On July 7, the parties again appeared before the judge, and judgment was delivered on August 4.

The judge decided that the attempt to distinguish the case from *Turner* v. *Baker* (1) by reason of the terms of the statutory scheme failed. With regard to the point raised on the Act of 1949 and to the hearing on July 7 he said this: "This "brings me to another point. This case was heard on April 4 "and May 31. On the latter day I reserved judgment. "Before this was delivered my registrar received a letter "from the tenant's counsel suggesting that I might have "been misled owing to his not having taken the point that "the Landlord and Tenant (Rent Control) Act, 1949, altered "the position. I had several cases in which this point arose. "Accordingly, I had this case and several others in my list "for July 7, as I thought that the point as to the effect of "the new Act might be argued. On this day, however, in "my view quite properly, the landlord's counsel chose to "resist any further argument. And though, no doubt, I "could have requested that it should take place I did not "think it right to do so and so deprive the landlord of what "might be an important argument in the higher court. "In fact, I carefully considered the argument in similar "cases with reference to the new Act and gave very full

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" reasons, which I do not propose to repeat now, for holding " that it was not retrospective so as to affect a case such as " this, where the landlord's right had become complete as a " result of a notice to quit ending the contractual rights of " the tenant before June 2 of this year when the Act came " into force."

We are not sure that we follow the penultimate paragraph. If in the events which had happened the law to be applied was the law as amended by s. 9, the fact that the landlord's counsel resisted further argument would, we think, be irrelevant. These Acts affect the jurisdiction to make an order. If on the other hand the judge was right in the conclusion set out in the last paragraph, then clearly the Act of 1949 had no application.

Since the date of this judgment there has been a decision of this court on the construction of ss. 9 and 10, namely, *Hutchinson* v. *Jauncey* (1). In that case it was conceded that there was a sharing of accommodation which would, apart from the Act of 1949, have deprived the tenant of the protection of the Acts. A valid notice to quit had been served expiring on April 25, 1949. Proceedings for possession were started on May 25. The hearing was subsequent to June 2, and the issue as to the effect of ss. 9 and 10 was argued before the county court judge, who held that the landlord had acquired rights before June 2 which were not affected by the two sections. That decision was reversed by this court.

The first argument was based on the principle that, when the law is altered during the pendency of an action, the rights of parties are decided according to the law as it existed when the action was begun. It is unnecessary to recapitulate the reasoning on which the court based their conclusion that that principle did not apply to the legislation under consideration. It was further argued that the concluding words of s. 10 themselves precluded the application of the sections. It was said that the issue of the plaint was within the words " anything done," and that it would be affected if the sections were applied. Evershed M.R. held that the words " anything done " could not refer to the issue of a summons or the service of a notice to quit. Asquith, L.J. did not disagree with this, but in a short judgment said that, assuming that the issue of the plaint was something done, it was not affected by the application of s. 9. Cohen L.J. said that the issue of the plaint was no doubt an act done but did not prevent the application of s. 9, presumably for the reason stated by Asquith, L.J. Whichever way it be put, the court decided that the initiation of proceedings did not in itself preclude the tenant from relying on these sections. It is sought to distinguish the present case on the ground that here the hearing had taken place on May 31 and there would in the ordinary course have been no further evidence or argument. If it can be distinguished it must be on the ground that the hearing on May 31 was within the words "anything done" and would be affected by the application of s. 9.

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On the view expressed by Evershed M.R. that the words "anything done" could not refer to the service of a notice to quit or the issue of a summons, it seems to us plain they could not refer to the stage reached on May 31. The issue of a notice to quit does prospectively affect the rights of the parties. The date of the issue of a summons is for certain purposes a relevant date for determining those rights. But a hearing when judgment is reserved, when either party is free to apply to be allowed to produce further argument or evidence, when the court can itself ask for further argument, is, in our opinion, a fortiori outside the words. Assuming, however, that the issue of a summons or plaint is within the words, then in our opinion there is not, so far as the proceedings are concerned, "anything done" within the section until an order is made. We think that Cohen L.J. was expressing this view when he said: "The issue of a plaint is, no doubt, "an act done within s. 10, but it is not equivalent to "judgment." It is therefore unnecessary to consider whether if it had been within the words it could be said that it was not affected by the application of the sections. We have not overlooked a passage in the judgment of Evershed M.R. in *Hutchinson* v. *Jauncey* (1), in which he emphasizes the fact that the hearing in that case was "a thing not done when the "Act was passed." The Master of the Rolls was not addressing his mind to the present problem, and, when he referred to the "hearing," he had in mind, no doubt, the ordinary case when the order is made at the conclusion of the hearing.

The appeal therefore succeeds. The rights of the parties

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fall to be determined in accordance with the provisions of ss. 9 and 10, and, applying those provisions, the ground upon which the order was made is not available to the landlord.

It is unnecessary to consider whether, if the tenant had failed on this point, he could have succeeded in distinguishing *Turner* v. *Baker* (1).

Appeal allowed.

Solicitors: *Alfred Kerstein & Co.; Lieberman, Leigh & Co.*

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J. L. D.

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[1948 G. 2209.]

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Nov. 16, 18.
1950
Jan. 11, 12, 13, 20.
Roxburgh J.

Revenue—Income tax—Royalties paid to landlord by tenant of gravel pit—Right to deduct tax.

By an agreement of November 24, 1942, the plaintiff demised to the defendants part of his farm for a term of 2 years at a rent of 10*l.* a year. The defendants had a right under the agreement to take away sand and gravel on the payment of royalties on the amount taken, and the rent was to merge in the royalties. The defendants paid 1,883*l.* 11*s.* 3*d.* in the aggregate on account of royalties, and they retained the like sum on account of income tax. The rent accordingly merged in the royalties and never became payable. The plaintiff accepted "credit notes" of the amounts due, and payments by cheque of the royalties which were accompanied by certificates of deduction of tax. He made no objection to the deductions during the payments which extended from March, 1943, until September, 1944. On February 27, 1945, the plaintiff objected to the deductions and asked for payment of the amounts thus deducted. At that date the defendants had only accounted to the Revenue for 279*l.* 8*s.* 3*d.*, being the tax deducted from the first royalty payment. The defendants ignored the plaintiff's claim, and accounted to the Revenue Authorities for the remaining tax deducted.

By way of defence to the plaintiff's action for payment of the sums deducted, the defendants contended that they were bound in law to make the deductions. In support of that contention they relied on s. 21, sub-s. 1 (6) of the Finance Act, 1934, and s. 15 or s. 17 of the Finance Act, 1940. They also contended that, the Commissioners having accepted them as correct, the jurisdiction of the court was excluded by r. 22 of the All Schedules

Rules of the Income Tax Act, 1918. The defendants finally contended that the plaintiff was estopped from claiming the deductions, and that his acceptance of the " credit notes," cheques and certificates of deduction constituted a settlement of account, or accord and satisfaction.

Held (1.), that the question was whether any deductions ought to have been made at all, whereas r. 22 presupposed that some deduction ought to be made and that only the amount was in dispute, and that therefore the jurisdiction of the court was not excluded by that rule.

(2.) That the payments were not " rent " within the meaning of s. 21, para. (*b*), of the Finance Act, 1934, because " rent " in that paragraph meant not royalties but the fixed rent, which never became payable as it had merged in the royalties.

(3.) That the fixed rent and the royalties were within s. 15 of the Finance Act, 1940, but that that section could not be invoked, because assessments under it had to be made on the recipient of the excess rent; and that, as the payments were within s. 15, they were excluded from s. 17.

(4.) That the plaintiff was estopped from claiming the 279*l*. 8*s*. 3*d*. which the defendants had deducted and accounted for to revenue authorities before the plaintiff objected to the deductions, but he was not so estopped in respect of the other deductions which the defendants had made and accounted for to the revenue authorities in direct opposition to the plaintiff's claim.

(5.) That it was not possible to deduce any contractual relationship between the parties such as an accord and satisfaction or a settlement of account, since they had both acted according to what they had thought were their legal obligations.

(6.) That the defendants were therefore not entitled to deduct tax on the royalties paid on the sand and gravel, these were an element in the annual value of the land and were taken into account in an assessment under sch. A of the Income Tax Act, 1918.

Russell v. *Scott* [1948] A.C. 422 and *Duke of Fife's Trustees* v. *Wimpey* 1943 S. C. 377 followed.

ACTION tried before Roxburgh J., sitting as an additional judge of the King's Bench Division.

The facts were stated in the judgment of Roxburgh J., substantially as follows :—

In 1942 a subsidiary of the defendant company, Boslymon Quarries, Ld., obtained a contract for the construction of a runway at an airfield at Brawdy, Pembrokeshire. For that purpose the company required suitable material for making up the surface under the foundations of the runway, and also sand and gravel for making concrete and cement. Such material was available in the neighbourhood, and in particular under the farm of the plaintiff, T. H. Gwyther.

On November 24, 1942, the defendant company entered into an agreement with the plaintiff, of which the following were the most important terms :—

" 1. The landlord demises unto the tenants first all " those pieces or parcels of land part of the farm known " as Brawdy Farm . . . . and all the stone sand and " gravel in and under such pieces of land, and secondly, " the rights and privileges hereinafter mentioned to hold " unto the tenants for the term of two years from the " 14th day of November, 1942, yielding and paying therefor " the rents and royalties hereinafter reserved and subject " to the provisions hereinafter contained.

" 2. The tenants shall and may at all times during the " said term work and get from or out of the said lands so " much stone sand and gravel as they shall think fit.

" 3. The tenants may from time to time during the said " term (*a*) lay place and stack on or upon any convenient " part of the said lands all or any of the stone sand and " gravel to be gotten under the powers hereof and all earth " and rubbish which shall be gotten thrown up or collected " in carrying on the works hereby authorized ; (*b*) carry " and convey away all such stone sand gravel earth and " rubbish as aforesaid and all materials used in or about " the said works (*c*) remove any hedges that may be " necessary.

" 4. The following rents and royalties are hereby reserved " in respect of the premises hereby demised and shall be " paid by the tenants to the landlord namely : (*a*) The " yearly rent of 10*l*. to be paid during the term hereby " granted by equal half-yearly payments on the 14th day of " November and the 14th day of May in every year the " first of such payments to be made on the 14th day of May " next such yearly rent to merge in the royalties hereinafter " mentioned. (*b*) The royalties of 1*s*. 6*d*. per cubic yard " for sand and gravel and 1*s*. per cubic yard for stone " which shall or may be gotten from or out of the said lands " in any year of the said term to be paid half yearly on the " 14th day of November and the 14th day of May in every " year in respect of stone sand and gravel gotten as aforesaid during the then preceding half year.

" 5. The tenants hereby agree with the landlord in manner " following namely . . . . (*c*) To cause the weight or "measurements of all materials got by virtue of this agree-"ment to be duly ascertained to the satisfaction of the "landlord or his surveyor or agent and not to remove or "suffer to be removed any of the same from the said lands "without the weight or measurement thereof being so "ascertained. (*d*) To keep or cause to be kept on the "said lands or at some other place approved by the landlord "proper books of account wherein shall be entered the "quantities of all materials got by virtue of this agreement "with the dates of production and all such particulars as "may in the opinion of the landlord be necessary or con-"venient for ascertaining the amount of the royalties to be "paid hereunder and to permit the landlord or his surveyor "or agent at all reasonable times to inspect the said books "of account and to take copies thereof or extracts therefrom. "And within fourteen days after each of the rent days "hereinbefore specified to make out and deliver to the "landlord or his surveyor or agent a sufficient abstract of "the said books of account of the royalties then payable."

In December 1942, the defendants or their subsidiary entered with a bulldozer and an excavator, which cleared the ground which was pasture and removed the top soil. The excavator scooped out sand and gravel to a depth which at one point may have been as much as 40 feet, but averaged 10 to 16 feet. The excavator also scooped out dirty gravel and lumpy agglomerations of pebbles and sand lying in faults in the gravel face. This was suitable for making up the surface under the foundations and was so used. It was described by the defendants and paid for as "stone," though the plaintiff called it "hoggin." It was not stone in the ordinary sense and was of no use except for making up a surface or some like purpose. There was stone in the usual sense (sandstone or limestone) beneath the seams of sand and gravel under the demised premises, but it was never worked.

The plaintiff exercised no supervision over the defendants' activities at the pit, and had no representative on the spot either to check quantities or for any other purpose. The fixed rent merged in the royalties and never became payable.

In April 1943, the defendants sent to the plaintiff's solicitors a "credit note" for royalties for the period December, 1942, to March, 1943, in the following terms: "Credit note. "T. H. Gwyther Esq., Brawdy Farm. By royalty on sand "and gravel during period December, 1942, to March, 1943:

"7,451 cubic yards at 1*s.* 6*d.* cubic yard, 558*l.* 16*s.* 6*d.*, "less tax at 10*s.* in the *l.*, 279*l.* 8*s.* 3*d.*," leaving a balance of 279*l.* 8*s.* 3*d.* A cheque for 279*l.* 8*s.* 3*d.* was enclosed but there was a discussion about the appropriate payee and ultimately this cheque was cancelled and another was later substituted. These were the only royalties attributable to the financial year ending April 4, 1943.

In May, 1943 the defendants sent a "credit note" for the month of April and a cheque for 227*l.* 10*s.* 3*d.* On May 17, 1943, the plaintiff's solicitors wrote to the defendants' secretary: "We thank you for cheque received this morning for "227*l.* 10*s.* 3*d.* payable to the above [that was to the plaintiff] "together with credit note. We have passed this on to "Mr. Gwyther and assume that you require no other acknow-"ledgment. In view of the large amount of the tax deducted "however we think you should furnish us on behalf of our "client with a proper certificate of deduction and perhaps "we may have this in course of post."

On June 4, 1943, the defendants sent the substituted cheque for 279*l.* 8*s.* 3*d.*, and on June 15, 1943, they sent certificates, of deduction of tax in respect of the two periods. The certificates were in common form and signed by the secretary of the defendants. In each case the certificates were sent at the request of the plaintiff's solicitors. There was no other correspondence about remittances. Thereafter until March, 1944, the defendants sent monthly "credit notes" accompanied by cheques and certificates of deduction of tax but without any covering letter. On August 3, 1944, they sent a "credit "note," cheque and certificate of deduction of tax for the period from April to June, 1944, and on September 5, 1944, they sent a final "credit note," cheque and certificate for July 1944 when the workings stopped. 1,883*l.* 11*s.* 3*d.* in all was paid and 1, 883*l.* 11*s.* 3*d.* was deducted. The plaintiff endorsed the cheques and received payment and also received and retained the "credit notes" and certificates. He gave no receipts. At an early stage he had made a remark to one of the defendants' employees questioning the deduction of tax, but he had not carried the matter any further at that time.

Both the defendants and the inspector of taxes proceeded throughout on the assumption that those royalties were taxable under No. III of sch. A to the Income Tax Act, 1918, transferred to sch. D by s. 28 of the Finance Act, 1926, and they treated the income tax position in the following manner:

the gross amount of the royalties was 3,767*l.* 2*s.* 6*d.* This was distributed in the defendants' accounts over three years as: year ending March 31, 1943, 558*l.* 16*s.* 6*d.*; year ending March 31, 1944, 2,628*l.* 5*s.* 6*d.*; year ending March 31, 1945 580*l.* 0*s.* 6*d.*, making a total of 3,767*l.* 2*s.* 6*d.* The deductions made by the defendants amounted to 1,883*l.* 11*s.* 3*d.* The deduction from the royalties for the period from December, 1942, to March, 1943, amounting to 279*l.* 8*s.* 3*d.*, was accounted for to the Inland Revenue Commissioners in the assessment made on the defendants' trading profits for the tax year 1943/1944, which became final in May, 1944.

However, no further part of the deductions made by the defendants had been made, or accounted for, to the commissioners when, on February 27, 1945, the plaintiff, through his solicitors, objected to them.

On February 14, 1945, the plaintiff's solicitors had written to the defendants: "We have been consulted by Mr. Thomas "Henry Gwyther with reference to the moneys due from you "to him under an agreement made between you and him "dated November 24, 1942. It appears that you have "withheld substantial sums which our client claims to be due "to him in respect of sand and gravel and that you seek to "justify these deductions on the ground that they are in "respect of Income Tax. We shall be glad if you will let us "know by what authority you claim to make these deductions. "If you have been directly assessed to Income Tax under "Schedule 'A' in respect of the land covered by the agreement, will you be good enough to send us the Notices of "Assessment, for inspection. If you have not been so assessed "will you kindly explain how the tax which you have "deducted has reached the Inland Revenue authorities."

The defendants handed that letter to their solicitors who replied on February 16, 1945: "The sums which our clients "have paid were for royalties on sand and gravel worked by "them and in law our clients had to deduct tax on the amounts. "With each payment our clients sent to Mr. Gwyther a certificate showing the amount deducted for tax and our clients "have already accounted to the Income Tax authorities therefor. If your client is entitled so to do he can claim the "amounts so deducted from the authorities by producing "the certificates."

The plaintiff's solicitors replied by the letter of February 27, 1940, referred to above, and stated that they did not agree that the defendants were obliged to deduct tax on the royalties. They asked that that letter should be treated as a formal demand for payment of the amounts which the defendants had deducted. The latter did not reply to this letter and the plaintiff's solicitors wrote again on March 8, 1945. That letter was answered by the defendants' solicitors on March 9, 1945, who said that they were looking into the matter.

On April 3, 1945, the plaintiff's solicitors wrote this further letter: "Referring to our letter dated February 14, 1945, "addressed to your clients and to our correspondence in this "matter, you stated in your letter dated March 9, 1945, that "you would write further during the course of the following "week. We have heard nothing from you. Unless we hear "from you in the course of this week we must advise our "client to proceed without further delay . . . ."

That letter was not answered and on June 28, 1948, the plaintiff's solicitors wrote again to the defendants' solicitors and stated that following the decision of the House of Lords in *Russell* v. *Scott* (1), they were advising their client, failing a refund of the amounts deducted by the defendants, to take the necessary proceedings for recovery.

The defendants ignored the plaintiff's contentions and proceeded to pay over or account for the balance of the deductions amounting to 1,604*l.* 3*s.* 0*d.*, without bringing the plaintiff's attitude to the notice of the inspector of taxes.

They did that under various assessments which became final between the date of the plaintiff's objection in February, 1945, and February, 1946. A payment of tax in respect of the year 1944/1945 was made in February, 1945 (shortly before the plaintiff's objection), when no final assessment for that year had then been made and an over-payment could at that date have been recovered.

The plaintiff's solicitors having failed to obtain any effective answer to their letter of February 27, 1945, had taken no further action until *Russell* v. *Scott* (1) was finally decided, after which they wrote the letter of June 28, 1948, referred to above. On November 5, 1948, the writ in this action was issued.

Honeyman for the plaintiff. The plaintiff is entitled to the sums which the defendants have deducted in paying the

(1) [1948] A. C. 422.

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royalties. The defendants had no right to make these deductions. It does not matter that they may now have accounted to the Revenue for the deductions, as they did so in opposition to the plaintiff's express demands, and with full knowledge of those demands. Until *Russell* v. *Scott* (1) was decided by the House of Lords some doubt existed whether sand and gravel pits were concerns within No. III of sch. A to the Income Tax Act, 1918. That case decided that sand and gravel were not within the charge under No. III, but were profits covered by the charge under No. I of sch. A.

This is a dispute not as to the amount of the deductions, but whether the defendants ought to have made them. It is not a question for the commissioners under r. 22 of the All Schedules Rules to the Income Tax Act, 1918 (2), but a question for the court: *Duke of Fife's Trustees* v. *Wimpey* (3)

C. N. Shawcross K.C. and *Bickford Smith* for the defendant company. Provided that the sums deducted by the defendants were "annual sums" within the meaning of r. 22, the commissioners had exclusive jurisdiction not only to decide how much tax should be deducted but also whether any deduction should be made: *Ecclesiastical Commissioners for England* v. *Sackville Estates, Ld.* (1). Rule 22 applies to "annual "sums" which are liable to tax. These sums are taxable under s. 15 or s. 17 of the Finance Act, 1940 (2). Prima facie

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(1) [1948] A. C. 422.

(2) The All Schedules Rules to the Income Tax Act, 1918, r. 19: "(1.) Where any . . . . annual "payment . . . . is payable "wholly out of profits or gains "brought into charge to tax, "no assessment shall be made "upon the person entitled to such ". . . . annual payment, but the "whole of those profits or gains "shall be assessed and charged "with tax on the person liable to "the . . . . annual payment, "without distinguishing the same, "and the person liable to make "such payment, whether out of "the profits or gains charged with "tax or out of any annual "payment liable to deduction, "or from which a deduction has "been made, shall be entitled, on "making such payment, to deduct "and retain thereout a sum "representing the amount of the "tax thereon . . . ."

Rule 21: "(1.) Upon payment "of any . . . . annual payment "charged with tax under "Schedule D. . . . . not payable, "or not wholly payable out of "profits or gains brought into "charge, the person by or through "whom any such payment is "made shall deduct thereout a "sum representing the amount "of the tax thereon . . . . "(2.) Any such person shall "forthwith render an account to "the Commissioners of Inland "Revenue . . . ."

Rule 22: "(1.) If a difference "arises—(*a*) between tenant and "landlord or any other persons "with regard to the deduction "on account of tax to be made "from any annual sum . . . . "the general commissioners of "the division shall settle the "proportion of the payments or "deductions to be made according "to the provisions of this Act ". . . . (2.) In any such case "the determination of the general "commissioners shall be final. "(3.) In this rule 'annual sum' "means" amongst other things "any . . . . rent . . . . or annual "payment."

(3) 1943 S. C. 377.

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(1) [1937] 2 K. B. 600.

(2) Finance Act, 1940, s. 13: "The next five succeeding sec- "tions apply only to land in the "United Kingdom chargeable to "tax under Schedule A, and in "this and the said next five "succeeding sections the following "expressions have the meanings "hereby respectively assigned to "them, that is to say 'immediate "'lessor' means in relation to "any premises (*a*) if different "parts of the premises are the "subject of separate tenancies or "separate occupations, a lessor "of the whole or any part of "the premises whose estate or "interest extends to the entirety "of the premises and is not "subject, immediately or "mediately, to a lease of the "entirety thereof . . . . 'lease' "includes an agreement for a "lease if the term to be covered "by the lease has begun, and "any tenancy, but does not "include a mortgage, and 'lessee' "and 'lessor' shall be construed "accordingly . . . . 'long lease' "means a lease granted for a "term exceeding fifty years . . . . "'short lease' means a lease "which is not a long lease; "'unit of assessment' means "any land which forms a unit "of assessment for the purposes "of Schedule A."

Section 15: "(1.) If, as "respects any year of assessment, "the immediate lessor of a unit "of assessment is entitled in "respect of the unit to any "rent payable under a lease or "leases to which this section "applies, he shall be chargeable "to tax under Case VI of "Schedule D. in respect of the "excess, if any, of the amount "which would have been the "amount of the assessment of "the unit for the purposes of "Schedule A, as reduced for the "purpose of collection, if the "annual value of the unit had "been determined (in accordance, "in whatever part of the United "Kingdom the unit is situated, "with the Rules applicable to "Schedule A set out in the "First Schedule to the Income "Tax Act, 1918) by reference "to that rent and the other "terms of the lease or leases, "over whichever is the greater "of—(*a*) the actual amount of "the assessment of the unit for "the purposes of Schedule A. "as reduced for the purpose of "collection; or (*b*) the amount "of any rent payable by the "immediate lessor in respect of "the unit under any short lease "or short leases. (2.) Where the "immediate lessor of any unit "of assessment is occupying any "part thereof, subsection (1.) of "this section shall apply as if "the rent to which he is entitled "in respect of the unit under any "lease or leases to which this "section applies were increased "by so much of the annual value "of the unit (as ascertained for

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these payments come within s. 15, being payments of rent under a short lease. The payments are similar to payments for minerals in a mining lease, which are usually referred to as "rent." *Earl Fitzwilliam's Collieries Co.* v. *Phillips* (1), *Coltness Iron Co.* v. *Black* (2). If no deduction had been made and the full amount had been paid to the plaintiff, it is probable that the payments would have been caught by s. 15 as "excess "rent," being other annual payments chargeable to tax under sch. D within the meaning of r. 21, under which the duty to deduct tax arises. Section 15 was designed to take in payments of the type which it had been held in *Fry* v. *Salisbury House Estate, Ld.* (3) were not liable to tax.

The duty to deduct tax is not dependent on a prior assessment having been made on the recipient of the payments. In practice deduction under r. 21 often anticipates the assessment. Alternatively, if these payments do not come under

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"the purposes of Schedule A) "as is attributable to the part "which he is occupying. "(3.) Where for any year an "assessment has been made on "an immediate lessor by virtue "of this section, the amount "of any relief which may be "claimed by him under Rule 8 "of No. V of Schedule A shall "be such amount as could have "been claimed by him if the "annual value of the unit had "been determined in the manner "described in subsection (1.) of "this section. (4.) A lease shall "be deemed to be a lease to which "this section applies if, and "only if, the following conditions "are fulfilled with respect to it— "(*a*) that it is a short lease; "(*b*) that the land comprised in "it is or forms part of a single "unit of assessment; (*c*) that "the rent under it is payable to "the immediate lessor of that "unit; (*d*) that the estate or "interest of the immediate lessor "of that unit is not, as respects "any part of that unit, subject "to any short lease which comprises also land not wholly "within that unit, being a lease "the rent under which is payable "to that immediate lessor."

Section 17, sub-s. 1: "This "section applies to the following "payments, that is to say— "(*a*) rents under long leases; "(*b*) other annual sums as defined "in paragraph (2.) of Rule 4 of "No. VIII of Schedule A, not "being rents under a short lease "or annuities within the meaning "of the Tithe Act, 1936, being "payments falling due on or after "the 6th day of April, 1940."

Sub-section 2: "Rules 1 and 4 "of No. VIII of Schedule A "shall not apply to any payment "to which this section applies, "but any such payment shall, "so far as it does not fall under "any other Case, be charged with "tax under Case VI of Schedule D "and be treated for the purposes "of such of the provisions of the "Income Tax Acts as apply to "royalties paid in respect of the "user of a patent as if it were such "a royalty."

(1) [1943] A. C. 570.

(2) (1881) 6 App. Cas. 315, 335.

(3) [1930] A. C. 432.

s. 15, they come under s. 17. It is not necessary for the defendants to prove which section applies, provided that they can show that the payment is within either s. 15 or s. 17. "Rent" in s. 15 is given an unusually narrow meaning. Section 17, on the other hand, was clearly intended to apply to this type of case. *Russell* v. *Scott* (1) and *Duke of Fife's Trustees* v. *Wimpey* (2) are distinguishable from the present case. In neither of those cases was there any relationship of landlord and tenant, and there was no question of any "annual "payment" of the type found here. The court is not bound by the Scottish case. If the *Duke of Fife's Trustees* v. *Wimpey* (2) be authority for saying that these payments are not rent, they may be "other annual sums" within s. 17. *Hill* v. *Gregory* (3) is distinguishable. That was a case under r. 19 and not r. 21. Rules 19 and 21 are complementary: but deduction is permissible under r. 19, whereas it is obligatory under r. 21. All these deductions were made under r. 21. [*Stewart* v. *Normanby Estate Company, Ld.* (4) and *Allchin* v. *Coulthard* (5) referred to.]

This case falls within s. 21, sub-s. 1 (*b*) of the Finance Act, 1934 (6), which does not require as a condition precedent of

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(1) [1948] A. C. 422.

(2) 1943 S. C. 377.

(3) [1912] 2 K. B. 61.

(4) (1933) 18 Tax Cas. 244.

(5) [1943] A. C. 607.

(6) The Finance Act, 1934, s. 21: "(1.) Where rent is "payable in respect of any land "the property in which is not "separately assessed and charged "under Schedule A, or in respect "of any easement, and (*a*) the "land or easement is used, "occupied or enjoyed in connexion "with any of the concerns speci-"fied in Rules 1, 2 and 3 of No. III "of Schedule A; or (*b*) the lease "or other agreement under which "the rent is payable provides "for the recoupment of the "rent by way of reduction of "royalties or payments of a "similar nature in the event of "the land or easement being "used, occupied or enjoyed as "aforesaid; the rent shall be "charged with tax under "Schedule D and shall, subject "to the provisions of this section, "be treated for the purpose of "such of the provisions of the "Income Tax Acts as refer to "royalties paid in respect of the "user of a patent as if it were "such a royalty."

"(4.) For the purpose of this "section—(*a*) the expression "'land' means lands, tenements, "hereditaments and heritages; "(*b*) the expression 'easement' "includes any right, privilege or "benefit in, over or derived "from land; (*c*) the expression "'rent' includes a rent service, "rent charge, fee farm rent, feu "duty or other rent, toll, duty, "royalty or annual or periodical "payment in the nature of rent, "whether payable in money or "money's worth or otherwise, its application that the easement should be used or enjoyed in connexion with a concern specified in No. III of sch. A. That sub-section is difficult to construe. There appears to be a change of meaning in the word "rent": when it is first mentioned it clearly means something other than royalties. Subsequently royalties appear to be within its scope. In s. 21, sub-s. 4 (*c*) "rent" by definition includes royalties.

Alternatively, if the above submissions on construction are wrong, the plaintiff is estopped from claiming these sums. His conduct constituted a settlement of account or an accord and satisfaction. He has led the defendants to believe that he has accepted a settled account. He agreed that the statement of account rendered by the defendants were accurate, and his acceptance of the "credit notes," cheques and certificates of tax deduction is consideration for the agreement by him that they constituted all that was due to him according to the account stated. *Bidder* v. *Bridges* (1); *Siqueira* v. *Noronha* (2). Ignorance of his legal rights cannot avail him: [*Rogers* v. *Ingham* (3), *Stafford* v. *Stafford* (4); *Henderson* v. *Folkestone Waterworks Co.* (5); *Skyring* v. *Greenwood* (6); *Holt* v. *Markham* (7); *Maclaine* v. *Gatty* (8) referred to.] A person acting in such a way as to induce other persons to act to their detriment may be estopped even though he be ignorant of his legal rights. The defendants were led by the plaintiff's conduct to continue making the deductions and to account for them to the Revenue; *Sawyer & Vincent* v. *Window Brace, Ld.* (9).

Honeyman in reply. This case is not within s. 21 of the Finance Act, 1934. That section was intended to cover the periodic payments inherent in the ownership of land which the House of Lords had held in *Elliott* v. *Burn* (10), were covered by the assessments under No. I of sch. A (see also *Stewart* v. *Normanby Estate Co., Ld.* (11).) These payments were deliberately linked with No. III of sch. A, which included mineral royalties.

"but does not include any of the "payments enumerated in Rules 1 "to 6 of No. II of Schedule A. "(5.) Rule 5 of No. III of "Schedule A (which provides for "the computation of the annual "value of the produce of any "such concern as aforesaid) shall "cease to hav effect."

(1) (1887) 37 Ch. D. 406.

(2) [1934] A. C. 332.

(3) (1876) 3 Ch. D. 351.

(4) (1857) 1 De G. & J. 193.

(5) (1885) 1 T. L. R. 329.

(6) (1825) 4 B. & C. 281.

(7) [1923] 1 K. B. 504.

(8) [1921] 1 A. C. 376.

(9) [1943] K. B. 32.

(10) [1935] A. C. 84.

(11) 18 Tax Cas. 244.

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Consequently when r. 5 of No. III was repealed, the tax on these payments became deductible by the person making the payment under rr. 19 and 21. Section 21, sub-s. 1 (*a*) applies when the land is worked in connexion with one of the concerns specified in No. III of sch. A. *Russell* v. *Scott* (1) shows that this case is outside its scope. Section 21, sub-s. 1 (*b*) applies to land held for the purpose of such a concern whether the land is worked or not. " Rent " in s. 21, sub-s. 1 (*b*) must be construed to exclude royalties, for if the land were being worked so that royalties were payable the case would be within s. 21, sub-s. 1 (*a*) and not s. 21, sub-s. 1 (*b*). On the question of the alternative applicability of ss. 15 or 17 of the Finance Act, 1940, if the case is under s. 15 the tax was leviable by direct assessment and therefore the defendants ought not to have made any declaration. On the other hand if it is within s. 17, they clearly had a right to deduct, but s. 17 does not apply to payments under short leases and it is limited to payments which were taxable before the Act of 1934. It only applied to payments in respect of which there has been a schedule A assessment.

There is no settled account, for there is no balance struck between the parties : see Bullen & Leake (3rd ed.) p. 478. The basis of this defence is that the plaintiff raised no objection ; but a mere failure to claim does not create the active volition which is a necessary element in a constructive contract : *Reg.* v. *Blenkinsop* (2).

Account settled is one aspect of accord and satisfaction. A mere omission to take any active step is not evidence of satisfaction : it does not preclude a subsequent claim unless it is barred by the Statute of Limitations. The plaintiff thought that he had no option but to permit the deductions : *Maclaine* v. *Gatty* (3). The defendants cannot plead estoppel : they did not deduct the tax because the plaintiff accepted their statements, but because they, like the plaintiff, were ignorant of the true legal position. The plaintiff acquiesced without full and sufficient knowledge of the true facts of the position : see *Prideaux* v. *Lonsdale* (4).

Cur. adv. vult.

Jan. 20. ROXBURGH J. read the following judgment, in which he stated the facts substantially as above set out and continued: The short effect of the decision in *Russell* v. *Scott* (1), is that the produce of sand and gravel pits, like the produce of the soil, is an element in the annual value of the land which has to be taken into account in raising an assessment under sch. A in accordance with No. I (which is the general rule for estimating the annual value of lands) and not otherwise. In fact the plaintiff, notwithstanding the agreement for letting, was and remained assessed to tax under sch. A on the whole of the farm, including the part let to the defendants. In *Russell* v. *Scott* (1) there was no actual letting of the land. I shall not lose sight of this distinction.

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(1) [1948] A. C. 422.
(2) [1892] 1 Q. B. 43.
(3) [1921] 1 A. C. 376.
(4) (1863) 4 Giff. 159, 177.

Of course, the sch. A assessment on the farm took no account of war-time sources of profit in connexion with the building of aerodromes, and if the plaintiff succeeds in this action he looks like making a handsome tax-free war-time profit; but he is entitled to take advantage, if he can, of a rule described by Lord Simon (2) as "so obscure and so difficult to expound "with confidence." The defendants have accounted to the inland revenue commissioners for the whole of the deductions which they made, and if (as they say) the commissioners will not refund in the event of the plaintiff's success, they will pay a heavy penalty for making a pardonable mistake in assembling the complex units of the tax-gathering machine. But the defendants paid over or accepted liability for 1,604*l.* 3*s.* 0*d.* out of the total claimed in the teeth of the plaintiff's opposition. So they took a big risk.

I must now turn to their defences. The first defence is that the jurisdiction of the court is excluded by r. 22 of the General Rules of the Income Tax Act, 1918.

[His Lordship read r. 22 and continued:] The issue in the present case is whether any deduction ought to have been made. Rule 22 seems to me to presuppose that some deduction ought to be made, only the amount being in dispute. There is nothing in *Ecclesiatical Commissioners for England* v. *Sackville Estates, Ld.* (3), which is inconsistent with this view, and I think that in adopting it I am following the Scots case of *Duke of Fife's Trustees* v. *Wimpey* (4). I will read this passage from the judgment of Lord Normand (5): "The Lord Ordinary has "held that the jurisdiction of the court is not excluded by "r. 22, and I agree with him and with the reasons which he

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(1) [1948] A. C. 422.
(2) Ibid. 433.
(3) [1937] 2 K. B. 600.
(4) 1943 S. C. 377.
(5) Ibid. 384.

" gives for his conclusion. I shall only add that, in my opinion, " r. 22 applies where an annual sum of the nature of rent falls " to be paid and there is a dispute about ' deduction on account " ' of tax to be made from it.' The General Commissioners " then have exclusive jurisdiction to ' settle the proportions " ' of the payments or deductions to be made according to the " ' provisions of the Act.' But, when the dispute is whether " the sum due under a contract is an annual sum or the price " due under a sale, the General Commissioners have no jurisdiction under r. 22 until it is decided by the court that the " sum due is an annual sum within the meaning of the section. " The defenders relied on *Ecclesiastical Commissioners for " England* v. *Sackville Estates, Ld.* (1), but in that case there " was no dispute that the plaintiffs were owed rent by the " defendants, and the dispute concerned the amount of " deduction for tax which the defendants were bound to make."

The next defence is that the deductions were authorized by s. 21, sub-s. 1 (*b*) of the Finance Act, 1934. [His Lordship read the relevant parts of s. 21, sub-ss. 1, and proceeded :] The case cannot fall within s. 21, sub-s. 1 (*a*) because this sand and gravel pit is not a concern specified in No. III of sch. A, but the rent is payable in respect of land, the property in which is not separately assessed and the letting certainly contains provisions to the effect mentioned in (*b*), for there is a right to quarry stone, though no stone was ever quarried. Accordingly, Mr. Shawcross argued, " the rent " (which by definition includes royalties) falls to be dealt with as indicated in that section.

In spite of the definition clause in sub-s. 4, " the rent " cannot include royalties in s. 21, sub-s. 1 (*b*), because if rent included royalties it could not be recouped by reduction of royalties, and " the rent " mentioned in s. 21, sub-s. 1 (*b*), which is coupled with the opening words of s. 21 by the word " and," cannot differ from " the rent " first mentioned in the section, and further " the rent " which is mentioned after the semi-colon at the end of (*b*) cannot differ from the rent first mentioned and last mentioned. Accordingly, in my judgment, s. 21, sub-s. 1 (*b*) must be confined to the fixed rent which never became payable because it merged in the royalties. It is, of course, easy to apply the definition of " rent " in connexion with (*a*).

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(1) [1937] 2 K. B. 600.

The next line of defence is based upon s. 15 or, alternatively, s. 17 of the Finance Act, 1940. I have already pointed out that the plaintiff, who owned the farm and was assessed upon the whole under sch. A and occupied most of it, let a small portion to the defendants together with the right to take stone sand and gravel, for a term of two years at a rent of 10*l.* a year which was to merge in the royalties, and accordingly this case differs from *Russell* v. *Scott* (1). [His Lordship read ss. 13 and 15 of the Finance Act, 1940, and continued :] In my judgment, s. 15 applies to the present case, but it will not aid the defendants, because assessments under s. 15 have to be made on the recipient of the excess rent under Miscellaneous rule, 1 applicable to sch. D and the rules applicable to Case VI of that schedule, and accordingly a tenant cannot be assessed on it and cannot make any deduction in respect of it.

[His Lordship read s. 17, sub-ss. 1 and 2 of the Finance Act, 1940, and proceeded :] But, as I have held that the fixed rents and royalties are within s. 15, they are excluded from s. 17. I note in passing the absence from s. 15 of the important words in s. 17, sub-s. 2, which enable the party paying the annual sums to make deductions.

I now come to the defence of estoppel. Here a distinction must be drawn between the deduction of 279*l.* 8*s.* 3*d.*, which was the only deduction accounted for to the inland revenue commissioners before the plaintiff objected to the deductions, and the other deductions. The payment of 279*l.* 8*s.* 3*d.* and the deduction of 279*l.* 8*s.* 3*d.* were effected through solicitors. The plaintiff's solicitors actually asked for a certificate of deduction of tax when accepting the payment on behalf of the plaintiff who cashed the cheque, and, in my judgment, thereby evinced an intention not to dispute the deduction. With hesitation I hold that (notwithstanding their later disregard of the plaintiff's views) the defendants acted on that indication of intention ; and, if they did, the detriment is clear.

As regards all the other deductions except one, the plaintiff did not ask for certificates of deduction, but merely accepted them and cashed the cheques ; but I am still prepared to hold that the plaintiff thereby evinced an intention not to dispute the deductions. But the defendants did not act on these indications of intention, for, when he changed his attitude, they took no notice but went on as before. Moreover, they had not paid over the deductions (notionally or otherwise) to the commissioners before the plaintiff had changed his attitude. The negotiations which they were then conducting with the inspector of taxes would have been necessary in any event, and there is no evidence that the plaintiff's delay in clarifying his position increased the cost of those negotiations. Accordingly, the defendants suffered no detriment as a result of the plaintiff's attitude.

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(1) [1948] A. C. 422.

Some point has been made of the long period which elapsed between the formal demand on February 27, 1945, and the issue of the writ; but the correspondence during 1945 closes with two unsuccessful attempts by the plaintiff's solicitors to get an answer to their letters, and the defendants, instead of answering the plaintiff's solicitors' letters and advising the inspector of taxes of the dispute, proceeded forthwith to allow themselves to become liable to the commissioners for part of the money in dispute, and by February, 1946, had allowed themselves to become liable for the whole. The defendants were not influenced by the plaintiff's delays, but by their own over-confidence. Accordingly, in my judgment, there is no estoppel except as regards the first deduction of 279*l.* 8*s.* 3*d.*

It is further contended that the acts of the plaintiff in receiving the "credit notes," cashing the cheques and accepting the certificates of deduction, constituted a "settlement of "account" or "accord and satisfaction"; but in my judgment there was, and is, no question of account between the parties. The question at issue is one of principle, namely, whether the defendants were entitled by the Income Tax Acts to make any deductions from admitted sums. Moreover, in my view, the conception of a "settlement" is alien to a situation in which each party thought that he had no option and acted accordingly. Similar difficulties beset the conception of "accord and satisfaction." I have no doubt that the defendants made the deductions because they thought that they had a right to do so, and that the plaintiff only acquiesced as long as he thought that he was bound to do so. It is, in my judgment, impossible to spell a contractual relationship out of conduct dictated by such considerations, and "accord "and satisfaction" necessarily involves some contractual modification of the original bargain. I must hold that neither party intended to modify the terms of the letting or agreed to treat payment of half the royalties, together with delivery of a certificate of deduction of tax, as satisfaction for an obligation to pay the whole. Each acted independently in supposed compliance with income tax law, and so long as each took the same view of it, their actions were in harmony. But those circumstances no more constitute an agreement in law than would the circumstance that two opposing litigants concurred in carrying out an order of court which afterwards turned out not to bind them.

Accordingly, all the defences fail, except the defence of estoppel in relation to the first deduction; and there must be judgment for the plaintiff for 1,604*l*. 3*s*. 0*d*.

Judgment for the plaintiff.

Solicitors: *L. Bingham & Co., for Lewis Morgan, Brown & Haslam, Cardiff, Reynolds & Co.*

I. G. R. M.

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Feb. 13, 14, 22.

Cohen and Asquith L.JJ. and Roxburgh J.

CARTER *v.* GREEN.

Landlord and tenant—Rent restriction—Sub-letting in breach of undertaking—" Any sub-tenant to whom the premises . . . . have been " lawfully sub-let "—No proviso for re-entry—Waiver in case of statutory tenancy—Unqualified acceptance of rent with knowledge of unlawful sub-letting—Meaning of " lawfully sub-let "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 3.

An unqualified acceptance of rent by a landlord, with knowledge of a breach of an undertaking in the agreement for letting by the tenant not to sub-let without the written consent of the landlord previously obtained, is as much an affirmance of the tenancy if it is a statutory tenancy as it would be in the case of a tenancy at common law. But in the case of a statutory tenancy, if an acceptance of rent were qualified, it would be a question of fact, for the trial judge to determine, whether that qualified acceptance must be treated in all circumstances as an unequivocal act of affirmance of that tenancy.

Judgment of Evershed L.J. in *Oak Property Co. Ld.* v. *Chapman* [1947] K. B. 886, so interpreted, followed.

Accordingly, in the case of a statutory tenancy where it was proved that the tenant had before the tenancy became statutory, in breach of a provision in the agreement for letting, sub-let a part of the premises without the written consent of the landlord previously obtained, but that subsequently, when the tenancy had become statutory, the landlord with knowledge of the breach had accepted rent from the tenant without qualification,

Held, that, assuming the sub-letting to have been originally unlawful, when the interest of the tenant determined the sub-tenant, as one to whom a part of the premises had been " lawfully " sub-let," was entitled to the protection of sub-s. 3 of s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and to be deemed to become the tenant of the landlord on the terms on which he would have held from the tenant if the tenancy had continued.

Semble, the revised opinion of Morton L.J. expressed in *Maley* v. *Fearn* (1946) 176 L. T. 203, 206, that if a sub-letting were contrary to the terms of the tenancy it might well be that it was an unlawful sub-letting even though under the terms of the tenancy the sub-letting did not give rise to a right of re-entry, was preferable to the contrary opinion which he had expressed in *Norman* v. *Simpson* [1946] K. B. 158, 162.

APPEAL from Dartford county court.

In December, 1940, the plaintiff, Carter, let No. 67 High Street, Bexley, to a Mrs. Warren at a weekly rent of 25*s*. In the rent book was the provision : " The tenant shall not " assign his interest in or sub-let or part with possession " of the premises or any part thereof . . . . without the " written consent being previously obtained from the land- " lord." In 1945, without having obtained that consent, Mrs. Warren, while she was still a contractual tenant, sub-let to the defendant two rooms on the first floor of the house with a lavatory and kitchen on the ground floor. The county court judge found as a fact that the landlord became aware of the sub-letting in 1947, rejecting his evidence that he did not become aware of it until October 6, 1948, when he made an entry in the rent book as follows : " The acceptance of " the rent does not constitute a waiver of my objection to " an unauthorized sub-letting." The rent was increased from 25*s*. 0*d*. to 35*s*. 0*d*. a week as from April 5, 1947, and, there being no evidence as to how this increase came to be made, counsel agreed that, following *Summers* v. *Donohue* (1), it must be assumed that the appropriate notice of intention to increase the rent had been given and that the increase had been properly made. Accordingly, as from April 5, 1947, the tenancy was a statutory one. The rent was not regularly

(1) [1945] K. B. 376.

paid. In April, 1948, the landlord received 17*l.* 10*s.* 0*d.* reducing the arrears to 5*l.* 5*s.* 0*d.* He received 10*l.* 10*s.* 0*d.* in June and July, 1948, and a further 7*l.* 15*s.* 0*d.* on August 5, 7*l.* on September 1, and 3*l.* 10*s.* 0*d.* on September 27. On October 6, 1948, he received a further 6*l.* 15*s.* 0*d.*, then making the entry in the rent book already set out.

The interest of the tenant having been determined, the landlord sued the sub-tenant for possession of the part of the house which she occupied, and the sub-tenant relied on sub-s. 3 of s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1).

Judge Daynes K.C., basing his decision on *Norman* v. *Simpson* (2), *Wright* v. *Arnold* (3), and *Watson* v. *Saunders-Roe Ld.* (4), found that the premises were lawfully sub-let to the defendant within the meaning of s. 15, sub-s. 3. He said that those decisions compelled him to find that the sub-letting, which in his opinion was merely in breach of contract and not fortified by a proviso for re-entry on breach of covenant, was not unlawful within the meaning of the sub-section. It was therefore unnecessary for him to consider whether, assuming that the sub-letting was originally unlawful, the defect was cured by subsequent waiver through the acceptance of rent by the landlord from his tenant. The landlord appealed.

R. G. Dow for the landlord. The tenant, Mrs. Warren, sub-let part of these premises in 1945, when she was a contractual tenant, contrary to the provision in her rent-book that she should not sub-let without the written consent of the landlord, previously obtained. The county court judge relied on the judgments in *Norman* v. *Simpson* (2), followed by *Wright* v. *Arnold* (3) and *Watson* v. *Saunders-Roe Ld.* (4), as showing that the sub-letting was not unlawful, since in this case there was no proviso for re-entry. In those three cases there was a proviso for re-entry, so that the original observation of Morton L.J. to the effect that, where there was no proviso for re-entry, the sub-letting was not unlawful was obiter. But in *Maley* v. *Fearn* (1), by another obiter dictum, Morton L.J. expressed the contrary opinion to the effect that although there might be no proviso for re-entry the breach of this undertaking made the sub-letting unlawful within the meaning of sub-s. 3 of s. 15 of the Act of 1920; and that, it must be taken, was his considered opinion. This sub-letting, therefore, was unlawful, the decision of the county court judge was wrong, and the sub-tenant is not protected by the sub-section. Further, on the facts, this case cannot be distinguished from *Maley* v. *Fearn* (1), where the court inferred from the evidence that the term which prohibited sub-letting without the consent of the landlord amounted to a condition enforceable by re-entry.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, sub-s. 3: "Where "the interest of a tenant of a "dwelling-house to which this "Act applies is determined, either "as the result of an order or "judgment for possession or eject-"ment, or for any other reason, "any sub-tenant to whom the "premises or any part thereof "have been lawfully sub-let, "shall, subject to the provisions "of this Act, be deemed to "become the tenant of the land-"lord on the same terms as he "would have held from the "tenant if the tenancy had "continued."

(2) [1946] K. B. 158.

(3) [1947] K. B. 280.

(4) Ibid, 437.

The county court judge gave no decision on the second ground, that, assuming this sub-letting to have been unlawful, the unlawfulness was cured by the acceptance of rent by the landlord after he had knowledge of the sub-letting. On this issue, in the year 1947 Mrs. Warren had become a statutory tenant and, that being so, the acceptance of rent did not affirm the tenancy, the defect was not waived, and the sub-letting remained unlawful: see the judgment of Evershed L.J. in *Oak Property Co. Ld.* v. *Chapman* (2). In any event, in the case of a statutory tenant, it appears from this judgment that the affirmation of the tenancy by the receipt of rent appears to be a question of fact for the county court judge, who did not go into this aspect of the case or find exactly when rent was first received by the landlord with knowledge of the sub-letting, or whether it was received with any qualification. There should therefore be a new trial.

R. I. Threlfall for the sub-tenant.

[COHEN L.J. Can you distinguish this case from that of *Maley* v. *Fearn* (1) ?]

I do not need to do so, since the sub-tenant must succeed on the second point. If the landlord accepted rent after he knew of the sub-letting, whether the acceptance was qualified

(1) (1946) 176 L. T. 203, 206.

(2) [1947] K. B. 886, 897–900.

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or unqualified, there was a waiver of the breach of the undertaking not to sub-let without the written consent of the landlord. The county court judge has found that the landlord knew of the sub-letting in 1947, and his acceptance of rent down to October 6, 1948, was unqualified. The breach of the undertaking was waived and the letting was not unlawful. The sub-tenant, therefore, was entitled to the protection of sub-s. 3 of s. 15.

Dow replied on the issue of waiver.

Cur. adv. vult.

Feb. 22. COHEN L.J. read the judgment of the court. The first question that the county court judge had to consider was whether or not, apart from any question of waiver, the premises were lawfully sub-let to the defendant within the meaning of s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. He answered that question in favour of the defendant, and therefore did not find it necessary to consider in any detail the question whether, assuming the sub-letting to be originally unlawful, the defect was cured by subsequent waiver through the acceptance of rent. The county court judge supported his finding on the first point by three decisions: *Norman* v. *Simpson* (1), *Wright* v. *Arnold* (2), and *Watson* v. *Saunders-Roe Ld.* (3). These decisions, he said, compelled him to find that the sub-letting, which in his opinion was merely in breach of contract and not fortified by a proviso for re-entry on breach of covenant, was not unlawful within the meaning of the section. That conclusion is, at first sight, supported by observations made by Morton L.J. in *Norman* v. *Simpson* (4), when he said: "It is not easy to see exactly what sub-tenants fall "within the latter class, but we think that the most "reasonable explanation of the sub-section is that premises "are in a state of being 'unlawfully sub-let' within the "sub-section if the head lessor has a subsisting right of re-entry, "and are in a state of being 'lawfully sub-let' when the head "lessor has no such right." It is, however, to be observed that in *Norman* v. *Simpson* (1), as well as in the other two cases relied on by the trial judge, there was, or was assumed

(1) [1946] K. B. 158.
(2) [1947] K. B. 280.
(3) Ibid 437.
(4) [1946] K. B. 158, 162.

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by the court to be found, in the contract a proviso for re-entry, and it was not necessary for the court to determine what the position would have been had the covenants not been fortified by such a proviso.

That question was discussed by this court in *Maley* v. *Fearn* (1). In that case also, as the court inferred from the evidence, the term which prohibited sub-letting without consent amounted to a condition enforceable by re-entry. At the beginning of his judgment Somervell L.J. said (2): "As will be seen, in that statement the category of unlawful "tenant is restricted to those whose sub-letting gives a right "of re-entry." That statement is the statement by Morton L.J., to which I have already referred. Somervell L.J. went on: "It is, I think, plain that in that case no argument "was addressed to the court as to the stipulations which give "rise to a right of re-entry for one reason or another and those "which do not. If one looks at the extract from the lease, "the covenant against sub-letting seems to be to all material "extent in the same terms as the covenant which is referred "to on page 230 of Woodfall's Landlord and Tenant (24th ed.) "as a covenant which does not constitute a condition, and, "there being no express provision, so far as I can see, for "re-entry, would not have itself afforded a right of re-entry. "I have thought it right to refer to this because it seems to "me that it would be wrong to take what was said by "Morton L.J. as deciding that a sub-tenancy is not unlawful "within the meaning of the Rent Restriction Acts, when it "comes into existence in consequence of the breach of a "covenant which does give a right of re-entry." Morton L.J. added some observations at the end of the judgments in the course of which he said of the passage in his judgment in *Norman* v. *Simpson*, which we have already cited (3): "I think "that in the passage . . . . (which was obiter) the "definition of what is an unlawful sub-letting was given "in too narrow terms. I am disposed to think (although "again what I say is obiter) that if a sub-letting is "contrary to the terms of the tenancy, it may well be that "it is an unlawful sub-letting, even although under the terms "of the tenancy the sub-letting does not give rise to a right "of re-entry."

(1) 176 L. T. 203.
(2) Ibid. 205.
(3) [1946] K. B. 158, 162.

In the present case the county court judge said with regard to these dicta that he could not read them as implying that the decision in *Norman* v. *Simpson* (1) was erroneous or that it did not depend upon the loss by the material time of an effective right of re-entry to which the breach had originally given rise. In one sense, of course, it is true that the decision in *Norman* v. *Simpson* (1) depended upon the existence of an effective right of re-entry, but we think only in the sense that it made it unnecessary to consider what the position would have been had that right not existed. We incline to agree with Morton L.J.'s obiter dictum at the end of the judgments in *Maley* v. *Fearn* (2), and should have been prepared, if necessary, to decide in the present case that the sub-letting to the defendant was initially unlawful, especially as we are unable to distinguish the terms of the tenancy in the present case from those in the tenancy which was under consideration by the court in *Maley* v. *Fearn* (2). It is not, however, necessary for us to express a concluded opinion on this point since we are clearly of opinion that the county court judge's decision ought to be upheld on the second ground which was argued before us, namely, that any unlawfulness was cured by the subsequent acceptance of rent with full knowledge of the facts.

This point was argued before us on the basis that at the time when the plaintiff accepted rent with knowledge of the fact of the sub-letting Mrs. Warren's tenancy had become a statutory tenancy. Mr. Dow in his able argument for the plaintiff contended that, on this basis, the decision must be in his client's favour having regard to a principle laid down by Evershed L.J. in *Oak Property Co. Ld.* v. *Chapman* (3).

The Lord Justice, in dealing with this point, first stated the rule at common law under which acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent only with its affirmance. He pointed out that so unequivocal was the act of acceptance of rent that the landlord was held disentitled to get the best of both worlds by attempts to qualify his acceptance, that is, by stating that he accepted the rent without prejudice to his rights of forfeiture. He then went on to consider the position as regards a statutory tenancy saying (1): "It must, in our judgment, be conceded that "the principles of the common law above stated cannot "apply or cannot wholly apply to a statutory tenancy. In "the first place, the landlord of a statutory tenant has no "right to avoid the tenancy: his only right is to invoke the "jurisdiction of the court to make an order for possession, "and the tenancy continues until at least the date of the "order. Secondly—and consequentially—the obligation of "the tenant to pay rent and the right of the landlord to accept "it continues notwithstanding the breach of covenant and "notwithstanding the landlord's election to invoke the court's "jurisdiction, and the issue by him of his summons pursuant "to his election. In our judgment, therefore, it may fairly "be said that the acceptance of rent by a landlord after "knowledge of a non-continuing breach of covenant by a "tenant entitling the landlord to go to the court is not so "unequivocal an act of affirmance of the tenancy as is "acceptance of rent in like circumstances from a contractual "tenant.

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(1) [1946] K. B. 158, 162.
(2) 176 L. T. 203, 206.
(3) [2947 K. B.] 886.

"On the other hand, it is, we think, important to bear "in mind, that, under the scheme of the Rent Restriction "Acts, the incidents of tenancy as understood by our law "continue to apply to a statutory tenancy so far as they are "consistent with the provisions of the Acts. From long "usage the acceptance of rent by a landlord after knowledge "of circumstances giving rise to a claim for possession has "come to be regarded by landlords and tenants alike as "evidence of an intention to affirm the tenancy. Moreover, "the landlord has, in the case of a statutory tenancy, a choice "—he may either rely on the breach and go to the courts, "or he may waive it—though his choice is not the same "as that presented to the common-law landlord. Finally "(and to this extent *Elliott* v. *Boynton* (2), in our view, assists "the sub-tenant), the continuance of the obligation to pay "rent under a contractual tenancy accruing after the breach "for some period is not itself inconsistent with the landlord's "election to forfeit. If, therefore, it is not justifiable to treat "the common-law rule as entirely applicable to a statutory "tenancy (as the county court judge implied), we think "that the question whether, in any case, the acceptance of

(1) [1947] K. B. 898.

(2) [1924] 1 Ch. 236.

"rent by the landlord is an unequivocal act of affirmance "of the tenancy is a question of fact for the judge to determine "in the circumstances of the case, and if he decides that "question of fact affirmatively, then the ordinary legal "consequences would, prima facie, follow. Thus, we are "strongly inclined to think that the strict common-law rule "in regard to a qualified acceptance of rent is not applicable "to a statutory tenancy, and that a qualified acceptance "of rent from a statutory tenant is not necessarily fatal to "the landlord's rights to seek an order for possession. As "at present advised, we think that the fair rule is that a landlord who has acquired full knowledge of a non-continuing "breach of covenant by a statutory tenant entitling him to "invoke the court's jurisdiction should be entitled thereafter "to receive rent and should not, by reason of such receipt, "be held to have waived the breach, provided that he makes "it clear to the tenant at the time of, or before, the receipt "that his receipt is without prejudice to his right to go to "the court, and provided that he issues his summons for "possession within such time as, having regard to all the "circumstances of the case, the court hearing the summons "regards as reasonable."

It is a little difficult to be certain how far the Lord Justice is laying down that the question whether acceptance of rent by the landlord amounts to an affirmance of the tenancy is one of law, and how far it is one of fact. We think, however, it is reasonably clear that he was only deciding that the principles of the common law cannot wholly apply to a statutory tenancy, and the question is how far he intended to hold that they do apply. We find guidance on this point in his statement that "we are strongly inclined to think that "the strict common-law rule in regard to a qualified acceptance "of rent is not applicable to a statutory tenancy and that a "qualified acceptance of rent from a statutory tenant is "not necessarily fatal to the landlord's rights to seek an "order for possession." From this passage we infer that what the Lord Justice meant was that an unqualified acceptance of rent is as much an affirmance of the statutory tenancy as it would be in the case of a common-law tenancy, but that if the acceptance of rent is qualified it would be a question of fact for the county court judge to determine whether that qualified acceptance must be treated in all the circumstances as an unequivocal act of affirmance of the tenancy. This view is, we think, supported by what he indicated as being a fair rule to guide the county court judge in reaching his conclusion on the facts. If that be the true view, how ought we to apply the principle to the present case ?

Mr. Dow, for the plaintiff, suggested that, as the trial judge had not gone really fully into this matter, or found definitely when rent was first received with knowledge of the contract, we ought to direct a new trial limited to that issue. We do not, however, think that we should be justified in putting the parties to the expense of a new trial. The judge has found quite plainly that the plaintiff had knowledge of the facts by the end of 1947. It is impossible for us, we think, to say that there was no evidence on which he could so find. Quite plainly the plaintiff would be in the greatest difficulty, in view of his evidence at the trial before the county court judge that he did not know of the sub-letting until October 6, 1948, if he were to give evidence that he had qualified his acceptance of rent during the period between January 1, 1948, and October 6, 1948.

In these circumstances it seems to us that the position is that the judge has found that the plaintiff knew of the sub-letting before January 1, 1948, and it is plain from the evidence that he received substantial payments of rent without in any way qualifying his receipt thereof between that date and October 6, 1948. We therefore think that we are bound to conclude that, even if the sub-demise was originally unlawful, the plaintiff had waived the illegality before he commenced the present action and thus the sub-tenancy had become a lawful one. That being so, the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors : *Kinch and Richardson, for T. G. Baynes & Sons, Dartford ; Dollman and Pritchard, for R. G. F. Vickery & Co., Bexley Heath.*

C. G. M.

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Mar. 1.

Evershed M.R., Denning and Jenkins L.JJ.

LEAF *v.* INTERNATIONAL GALLERIES (A FIRM).

Sale of goods—Innocent misrepresentation as to painter of picture—Discovery by purchaser five years later—Claim to rescind—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 11, 35.

In 1944 the defendants sold to the plaintiff for 85*l.* a picture which they represented to have been painted by J. Constable. In 1949 the plaintiff tried to sell it at Christies and was then informed that it had not been painted by Constable. He thereupon took it back to the defendants who retained it for investigation. As they still maintained that it was painted by Constable, the plaintiff brought an action in which he claimed rescission of the contract and repayment of the 85*l.* The county court judge found that the defendants had made an innocent misrepresentation and that the picture had not been painted by Constable, but he gave judgment for the defendants on the ground that the remedy of rescission was not available where a contract had been executed.

Held, assuming the equitable remedy of rescission for an innocent misrepresentation to be open to a buyer of goods, that it was not open to the buyer in this case as it had not been exercised within a reasonable time.

Per Evershed M.R. If a man elects to buy a chattel, especially a work of art, upon the faith of some representation which has no contractually binding effect, and delivery of the chattel is accepted, there is much to be said for the view that on acceptance there is an end of that particular transaction.

Per Evershed M.R. and Jenkins L.J. Where a statement by the seller amounts to a warranty, in which case the law gives an adequate remedy in damages if the warranty be broken, it is doubtful whether the equitable remedy of rescission for innocent misrepresentation ought to be granted at all.

Per Denning L.J. Assuming that the statement that the picture was painted by Constable was a condition of the contract, the buyer had lost his right to reject on the ground of breach of condition and was relegated to his right to claim damages for that breach; and if a claim to reject on the ground of breach of condition is barred a claim to rescission on the ground of innocent misrepresentation is a fortiori barred.

Seddon v. *North Eastern Salt Co., Ld.* [1905] 1 Ch. 326; *Angel* v. *Jay* [1911] 1 K. B. 666, the observations of Warrington and Scrutton L.JJ. in *T. & J. Harrison* v. *Knowles and Foster* [1918] 1 K. B. 608, 609, 610; and of Lord Atkin in *Bell* v. *Lever Bros. Ld.* [1932] A. C. 161, 224, and *Solle* v. *Butcher* [1950] 1 K. B. 671, considered.

APPEAL from Westminster county court.

The plaintiff, Ernest Louis Leaf, on March 8, 1944, purchased from the defendants, International Galleries, a firm, a picture

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called "Salisbury Cathedral" for 85*l.* At the time of the purchase the defendants represented that the picture was painted by John Constable, but when five years later the plaintiff tried to sell it he was informed that it was not by Constable. Thereupon he returned it to the defendants and asked them to refund the 85*l.* which he had paid for it. The defendants having refused to do so, the plaintiff by this action claimed to rescind the contract and to have repayment of the 85*l.*

When the hearing began in the county court, the judge suggested that the plaintiff's proper remedy was a claim for damages, and asked if he wished to amend his claim. It was then stated that no such amendment was desired. At the end of the hearing, however, the plaintiff applied for leave to amend and add a claim for damages, but this was refused on the ground that the application had been made too late. The county court judge found that the defendants had made an innocent misrepresentation and that the picture had not been painted by Constable. He gave judgment for them, however, holding, on the authority of *Angel* v. *Jay* (1), that the equitable remedy of rescission was not available in the case of an executed contract.

The plaintiff appealed.

Weitzman for the plaintiff. The plaintiff is entitled to rescind this contract. He agreed to purchase a picture painted by Constable and it is now established that the picture was not painted by Constable. In *Wilde* v. *Gibson* (2) Lord Campbell said that where there had been an innocent misrepresentation rescission would not be ordered after conveyance. Joyce J. expressed the same opinion in *Seddon* v. *North Eastern Salt Co. Ld.* (3), and that principle was applied in *Angel* v. *Jay* (1). Similar views have been expressed in *Redgrave* v. *Hurd* (4), *Whittington* v. *Seale-Hayne* (5), and *Armstrong* v. *Jackson* (6). Since those cases were decided, however, many judges have expressed the opinion that rescission could be granted of an executed contract where there had been an innocent misrepresentation: see per Lord Atkin in *Bell* v. *Lever Bros. Ld.* (7), *MacKenzie* v. *Royal Bank of*

(1) [1911] 1 K. B. 666.
(2) (1848) 1 H. L. C. 605, 632.
(3) [1905] 1 Ch. 326, 332.
(4) (1881) 20 Ch. D. 1.
(5) (1900) 82 L. T. 49.
(6) [1917] 2 K. B. 822.
(7) [1932] A. C. 161, 224.

Canada (1), and the decision of the Court of Appeal in *Solle* v. *Butcher* (2). The principle that rescission cannot be obtained of an executed contract has been criticized in an article in the Law Quarterly Review, vol. 55, p. 90. It is submitted that the true view is that rescission can be obtained of an executed contract so long as restitutio in integrum is possible. Here the parties can be restored to their original position, since the plaintiff can return the picture to the defendants. The plaintiff was under no obligation to have the picture examined when he purchased it. He has only now discovered that he has not got what he purchased.

He is entitled to elect whether he will claim damages under s. 11 of the Sale of Goods Act, 1893, (3) for breach of warranty or whether he will claim rescission. Time did not begin to run against the plaintiff until he discovered that the picture was not in fact painted by Constable.

John Perrett and *K. G. Jupp*, for the defendants, were not called on.

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(1) [1934] A. C. 468, 475.

(2) [1950] 1 K.B. 671.

(3) The Sale of Goods Act, 1893, s. 11: "(1.) In England or "Ireland—(*a*) where a contract "of sale is subject to any condi- "tion to be fulfilled by the "seller, the buyer may waive "the condition, or may elect "to treat the breach of such "condition as a breach of "warranty, and not as a ground "for treating the contract as "repudiated: (*b*) Where a stipu- "lation in a contract of sale is "a condition, the breach of "which may give rise to a right "to treat the contract as "repudiated, or a warranty, the "breach of which may give rise "to a claim for damages but not "to a right to reject the goods "and treat the contract as "repudiated, depends in each "case on the construction of the "contract. A stipulation may be "a condition, though called a "warranty in the contract: "(*c*) Where a contract of sale is "not severable, and the buyer "has accepted the goods, or part "thereof, or where the contract "is for specific goods, the property "in which has passed to the buyer, "the breach of any condition to "be fulfilled by the seller can "only be treated as a breach of "warranty, and not as a ground "for rejecting the goods and "treating the contract as repu- "diated, unless there be a term "of the contract, express or "implied to that effect."

Section 35: "The buyer is "deemed to have accepted the "goods when he intimates to the "seller that he has accepted "them, or when the goods have "been delivered to him, and he "does any act in relation to "them which is inconsistent with "the ownership of the seller, or "when after the lapse of a reason- "able time, he retains the goods "without intimating to the seller "that he has rejected them."

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DENNING L.J. [asked by Evershed M.R. to deliver the first judgment, stated the facts and continued :] The question is whether the plaintiff is entitled to rescind the contract on the ground that the picture in question was not painted by Constable. I emphasize that it is a claim to rescind only: there is no claim in this action for damages for breach of condition or breach of warranty. The claim is simply one for rescission. At a very late stage before the county court judge counsel did ask for leave to amend by claiming damages for breach of warranty, but it was not allowed. No claim for damages is before us at all. The only question is whether the plaintiff is entitled to rescind.

The way in which the case is put by Mr. Weitzman, on behalf of the plaintiff, is this : he says that this was an innocent misrepresentation and that in equity he is, or should be, entitled to claim rescission even of an executed contract of sale on that account. He points out that the judge has found that it is quite possible to restore the parties to their original position. It can be done by simply handing back the picture to the defendants.

In my opinion, this case is to be decided according to the well known principles applicable to the sale of goods. This was a contract for the sale of goods. There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable ; and that mistake was in one sense essential or fundamental. But such a mistake does not avoid the contract : there was no mistake at all about the subject-matter of the sale. It was a specific picture, "Salisbury Cathedral." The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract : see *Solle* v. *Butcher* (1).

There was a term in the contract as to the quality of the subject-matter : namely, as to the person by whom the picture was painted—that it was by Constable. That term of the contract was, according to our terminology, either a condition or a warranty. If it was a condition, the buyer could reject the picture for breach of the condition at any time before he accepted it, or is deemed to have accepted it ; whereas, if it was only a warranty, he could not reject it at all but was confined to a claim for damages.

I think it right to assume in the buyer's favour that this term was a condition, and that, if he had come in proper time

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(1) [1950] 1 K.B. 671

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he could have rejected the picture; but the right to reject for breach of condition has always been limited by the rule that, once the buyer has accepted, or is deemed to have accepted, the goods in performance of the contract, then he cannot thereafter reject, but is relegated to his claim for damages: see s. 11, sub-s. 1 (*c*), of the Sale of Goods Act, 1893, and *Wallis, Son & Wells* v. *Pratt & Haynes* (1).

The circumstances in which a buyer is deemed to have accepted goods in performance of the contract are set out in s. 35 of the Act, which says that the buyer is deemed to have accepted the goods, amongst other things, "when, after the "lapse of a reasonable time, he retains the goods without "intimating to the seller that he has rejected them." In this case the buyer took the picture into his house and, apparently, hung it there, and five years passed before he intimated any rejection at all. That, I need hardly say, is much more than a reasonable time. It is far too late for him at the end of five years to reject this picture for breach of any condition. His remedy after that length of time is for damages only, a claim which he has not brought before the court.

Is it to be said that the buyer is in any better position by relying on the representation, not as a condition, but as an innocent misrepresentation? I agree that on a contract for the sale of goods an innocent material misrepresentation may, in a proper case, be a ground for rescission even after the contract has been executed. The observations of Joyce J. in *Seddon* v. *North Eastern Salt Co. Ld.* (2), are, in my opinion, not good law. Many judges have treated it as plain that an executed contract of sale may be rescinded for innocent misrepresentation: see, for instance, per Warrington L.J. and Scrutton L.J. in *T. & J. Harrison* v. *Knowles and Foster* (3); per Lord Atkin in *Bell* v. *Lever Bros. Ld.* (4); and per Scrutton L.J. and Maugham L.J. in *L'Estrange* v. *F. Graucob Ld.* (5).

Apart from that, there is now the decision of the majority of this court in *Solle* v. *Butcher* (6), which overrules the first ground of decision in *Angel* v. *Jay* (7). But it is unnecessary to explore these matters now.

Although rescission may in some cases be a proper remedy, it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition; and a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred. A condition is a term of the contract of a most material character, and if a claim to reject on that account is barred, it seems to me a fortiori that a claim to rescission on the ground of innocent misrepresentation is also barred.

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(1) [1910] 2 K. B. 1003, [1911] A. C. 394.

(2) [1905] 1 Ch. 326.

(3) [1918] 1 K. B. 608, 609, 610.

(4) [1932] A. C. 161, 224.

(5) [1934] 2 K. B. 394, 400, 405.

(6) [1950] 1 K. B. 671.

(7) [1911] 1 K. B. 666.

So, assuming that a contract for the sale of goods may be rescinded in a proper case for innocent misrepresentation, the claim is barred in this case for the self-same reason as a right to reject is barred. The buyer has accepted the picture. He had ample opportunity for examination in the first few days after he had bought it. Then was the time to see if the condition or representation was fulfilled. Yet he has kept it all this time. Five years have elapsed without any notice of rejection. In my judgment he cannot now claim to rescind. His only claim, if any, as the county court judge said, was one for damages, which he has not made in this action. In my judgment, therefore, the appeal should be dismissed.

JENKINS L.J. I agree. So far as dealings in land are concerned there is a considerable body of authority to the effect that rescission on the ground of innocent misrepresentation will not be allowed after conveyance. For instance, there are the observations of Lord Campbell to that effect in *Wilde* v. *Gibson* (1); and the doctrine has also been applied to leases in *Angel* v. *Jay* (2). In some of the cases, on the strength of the authorities concerning sales of land, the proposition has been stated in general terms to the effect that no executed contract can after completion be rescinded on the ground of innocent misrepresentation. As appears from the recent decision of the majority of this court in *Solle* v. *Butcher* (3), it seems probable that the proposition thus generally stated is unduly wide. In particular, it cannot be assumed that it necessarily holds good with respect to a sale of chattels passing by delivery. For the purposes of this case, however, I find it unnecessary to decide how far it is possible to claim, on the ground of innocent misrepresentation, rescission of a contract for the sale of chattels passing by delivery after the contract has been completed by delivery of those chattels; and I propose to confine myself to considering

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(1) 1 H. L. C. 605, 632.
(2) [1911] 1 K. B. 666.
(3) [1950] 1 K. B. 671.

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whether, assuming such a claim to be open, this is a case in which it should properly be allowed.

In my judgment, that question must clearly be answered in the negative on the facts of this case. It is true that the plaintiff bought the picture on the faith of the representation, innocently made, that it was a painting by Constable. It is true that this was a representation of great importance, which went to the root of the contract and induced him to buy. Clearly if, before he had taken delivery of the picture, he had obtained other advice and come to the conclusion that the picture was not a Constable, it would have been open to him to rescind. It may be that if, having taken delivery of the picture on the faith of the representation and having taken it home, he had, within a reasonable time, taken other advice and satisfied himself that it was not a Constable, he might have been able to make good his claim to rescission notwithstanding the delivery. That point I propose to leave open. What in fact happened was that he took delivery of the picture, kept it for some five years, and took no steps to obtain any further evidence as to its authorship; and that, finally, when he was minded to sell the picture at the end of a matter of five years, the untruth of the representation was brought to light.

In those circumstances, it seems to me to be quite out of the question that a court of equity should grant relief by way of rescission. It is perfectly true that the county court judge held that there had been no laches, and, of course, it may be said that the plaintiff had no occasion to obtain any further evidence as to the authorship of the picture until he wanted to sell; but in my judgment contracts such as this cannot be kept open and subject to the possibility of rescission indefinitely. Assuming that completion is not fatal to his claim, I think that, at all events, it behoves the purchaser either to verify or, as the case may be, to disprove the representation within a reasonable time, or else stand or fall by it. If he is allowed to wait five, ten, or twenty years and then reopen the bargain, there can be no finality at all. I, for my part, do not think that equity will intervene in such a case, more especially as in the present case it cannot be said that, apart from rescission, the plaintiff would have been without remedy. The county court judge was of opinion, and it seems to me that he was clearly right, that the representation that the picture was a Constable amounted to

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a warranty. If it amounted to a warranty, and that was broken, as on the findings of the county court judge it was, then the plaintiff had a right at law in the shape of damages for breach of warranty. That remedy he did not choose to exercise, and, although he was invited at the hearing to amend his claim so as to include a claim for breach of warranty, he declined that opportunity. That being so, it seems to me that he has no justification at all for now coming to equity five years after the event and claiming rescission. Accordingly, it seems to me that this is not a case in which the equitable remedy of rescission, assuming it to be available in the absence of fraud in respect of a completed sale of chattels, should be allowed to the plaintiff. For these reasons, I agree that the appeal fails and should be dismissed.

Evershed M.R. I also agree that this appeal should be dismissed, for the reasons which have already been given. On the facts of this case it seems to me that the plaintiff ought not now to be allowed to rescind this contract. In the circumstances it is unnecessary, as my Brethren have already observed, to express any conclusion on the more general matter whether the so-called doctrine which finds expression in the headnote to *Seddon* v. *North Eastern Salt Co. Ld.* (1) ought now to be treated as of full effect and validity. The doubt on that matter is the greater since the observations of the majority of this court in the recent decision in *Solle* v. *Butcher* (2); but out of respect to the forceful argument of Mr. Weitzman and because the matter is one of interest to lawyers (see, for example, the article in the Law Quarterly Review, vol. 55, p. 90, which has been read to us), I venture to add some observations which may be relevant when the general application of this doctrine has to be further considered.

The plaintiff's case rested fundamentally upon this statement which he made: "I contracted to buy a Constable. I have "not had, and never had, a Constable." Though that is, as a matter of language, perfectly intelligible, it nevertheless needs a little expansion if it is to be quite accurate. What he contracted to buy and what he bought was a specific chattel, namely, an oil painting of Salisbury Cathedral; but he bought it on the faith of a representation, innocently made, that it had been painted by John Constable. It turns out, as

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(1) [1905] 1 Ch. 326. (2) [1950] 1 K. B. 671.

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the evidence now stands and as the county court judge has found, that it was not so painted. Nevertheless it remains true to say that the plaintiff still has the article which he contracted to buy. The difference is no doubt considerable, but it is, as Denning L.J. has observed, a difference in quality and in value rather than in the substance of the thing itself.

That leads me to suggest this matter for consideration: the attribution of works of art to particular artists is often a matter of great controversy and increasing difficulty as time goes on. If the plaintiff is right in saying that he is entitled, perhaps years after the purchase, to raise the question whether in truth a particular painting was rightly attributed to a particular artist, most costly and difficult litigation may result. There may turn out to be divergent views on the part of artists and critics of great eminence, and the prevailing view at one date may be quite different from that which prevails at a later date.

There is, moreover, a further point: the county court judge has found here that restitutio in integrum is possible, meaning thereby, as I understand it, that the picture itself retains the condition and quality that it had on the sale in 1944: it can therefore be returned to the sellers and they can return the 85*l*. paid. But, if the view for which Mr. Weitzman has contended is to prevail and be of general application, many cases may arise in which other controversies of equal difficulty and complexity may have to be determined; for example, whether in the interval there has been a change through wear and tear, or otherwise, in the article which has been sold. A set of chairs attributed to Chippendale might after being used for six years well be said to have suffered damage which, though it does not substantially or greatly alter their value as chairs, may, nevertheless, appreciably diminish their market value. Again, the fashion in these things, and consequently their value, varies from time to time.

It seems to me, therefore, that if Mr. Weitzman's view is to be accepted, there may arise matters for determination of great difficulty and complexity leading to uncertainty and considerable litigation; and, as between one case and another, the alleged rule of equity may work somewhat capriciously. Those are results which, as it seems to me, are in themselves undesirable. If a man elects to buy a work of art or any other chattel on the faith of some representation, innocently made, and delivery of the article is accepted, there is much

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to be said for the view that on acceptance there is an end of that particular transaction, and that, if it were otherwise, business dealings in these things would become hazardous, difficult and uncertain.

A representation of this kind may either be a warranty or not, or equivalent to a warranty or not. If not, then the matters to which I have already referred seem to me to gain in importance. I need not elaborate the point by example. But if the representation does amount to a warranty, then, as Jenkins L.J. has pointed out, there is available, when the breach is discovered, a remedy at law which is reasonably certain, and capable of giving adequate compensation to the injured party. And if such a remedy at law is available, then, as it seems to me, there is less ground for invoking a rule of equity to supplement the law.

Finally, I add this: true it is that since the observations of Scrutton L.J. in *Lever Bros Ld.* v. *Bell* (1), and of this court in *Solle* v. *Butcher* (2), much greater doubt may be entertained about the validity of Joyce J.'s decision in 1905. Still, it was given forty-five years ago. The article that Mr. Weitzman read to us was written eleven years ago. There has been opportunity for Parliament to alter the law if it was thought to be inadequate. I am not saying that that is a ground on which we should conclude that the so-called doctrine of *Seddon* v. *North Eastern Salt Co. Ld.* (3) is well stated or is in all respects correct; but the fact that it has stood for such a length of time, even though qualified, is another consideration deserving of some weight, when this matter has further to be debated and to be adjudicated upon.

I have added those remarks out of respect to the argument and because of the importance of the case; but I base my conclusion upon those grounds which have already been stated by my brethren and which it would be mere repetition on my part to state again.

Appeal dismissed.

Solicitors: *Hart-Leverton & Co.; Blyth, Dutton, Wright and Bennett.*

(1) [1931] 1 K. B. 557.
(2) [1950] 1 K. B. 671.
(3) [1905] 1 Ch. 326.

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FOWLER *v.* BRATT.

1950
Feb. 27, 28.

Evershed M.R.,
Denning and
Jenkins L.JJ.

Principal and agent—Estate agent—Instruction to agent to find purchaser—Agent's letter accepting purchaser's offer with principal's approval—Reply sending deposit as asked—Subsequent abandonment of sale by principal—Right of agent to commission.

The defendant instructed the plaintiff, a house agent, to find a purchaser of his house and agreed to pay 2½ per cent. commission on the price. The plaintiff introduced a potential purchaser who made an offer of 2,850*l.* for the house by telephone. On November 20, 1948, the plaintiff wrote a letter in the defendant's presence, headed with the address of the house, stating that the defendant accepted the offer and requesting the purchaser to send a cheque for 280*l.*, being 10 per cent. deposit, by return. The letter ended: "Referring to possession, [the defendant] "suggests possession in two months, as he will have to dispose "of his effects. We shall be glad to hear if this date is suitable "to you, failing which [the defendant] is prepared to discuss "the date of possession with you, if you would kindly make an "appointment." On November 23, 1948, the purchaser wrote a letter headed with the address of the house: "Please find "enclosed cheque value 280*l.*, being deposit on the above "property." Subsequently the defendant decided not to go on with the sale, and the plaintiff brought proceedings in the county court for 72*l.* 10*s.* 0*d.*, being the amount of the commission.

Held, (1.) that in order to earn the commission, the plaintiff had to find a purchaser who was bound in law to buy: dicta of Lord Russell of Killowen and Lord Romer in *Luxor (Eastbourne) Ld.* v. *Cooper* [1941] A. C. 126 and 154 applied; (2.) that the letters of November 20 and 23, 1948, could be connected so as to constitute a sufficient memorandum of a contract of sale and purchase: *Long* v. *Millar* (1879) 4 C. P. D. 450 applied: and (3.) that the passage in the letter of November 20, 1948, raising the question of the date of possession did not prevent the letters from constituting a contract, for while that passage left it open to the parties to agree the date, the date of possession [often the date of completion also] was not prima facie of the essence of the contract.

APPEAL from Cardiff county court.

On September 13, 1948, the defendant, Barry Bratt, gave instructions to the plaintiff, William Howard Fowler, a house and estate agent (trading as William Fowler & Son) to obtain a purchaser for him of his house No. 355 Lansdowne Road, Cardiff. He agreed to pay commission at the rate of 2½ per cent. on the price. The defendant originally wanted 3,000*l.*, but the plaintiff found one Harris, who was anxious to buy the house but at first only offered 2,750*l.* The plaintiff saw the defendant in regard to this offer and in his presence wrote a letter dated November 17, 1948, in which it was stated that the defendant had fully expected to obtain 3,000*l.*, but that, if the purchaser made an offer of 2,850*l.*, the defendant could, it was thought, be induced to accept it. On November 19, the purchaser's wife, on behalf of her husband telephoned agreeing to make an offer of 2,850*l.* On November 20, the plaintiff sent another letter to the purchaser written in the defendant's presence which was headed, " Re " 355 Lansdowne Road, Cardiff," and was in these terms: " Further to our letter of the 17th instant, and Mrs. Harris' " telephone message of the 19th instant making an offer of " 2,850*l.* for the above property, we are pleased to advise " that we put this offer before Mr. Bratt by letter, on the 19th " instant, and we have interviewed him to-day; and we are " pleased to advise you that after some persuasion, Mr. Bratt " has accepted your offer of 2,850*l.* Would you kindly let " us have your cheque value 280*l.*, being 10 per cent. deposit " on this property by return. Referring to possession, Mr. " Bratt suggests possession in two months, as he will have " to dispose of all his effects. We shall be glad to hear if this " date is suitable to you, failing which, Mr. Bratt is prepared " to discuss the date of possession with you, if you would " kindly make an appointment." This letter was signed in the firm's name and on November 23, Mr. Harris wrote the firm in a letter headed—" Re 355 Lansdowne Road: " Please find enclosed cheque value 280*l.*, being deposit on the " above property."

On November 25 the defendant's solicitor rang up the plaintiff to say that the defendant had called and left a message to say that he did not wish to go on with the sale. After efforts by the plaintiff to see, and by the purchaser and his wife to communicate with the defendant, the purchaser's wife telephoned to the plaintiff expressing great annoyance at the defendant's failure to call as had been arranged and saying that, unless the defendant attended to the matter at once, the deposit should be returned. On December 2, the defendant called at the plaintiff's office and, as the plaintiff was out, left a message to the effect that he had seen the purchaser's wife and explained matters, and that he would leave any idea of a sale for three or four months, and instructing the plaintiff to return the deposit. On December 18 the plaintiff wrote to the defendant claiming his commission of 72*l.* 10*s.*, in connexion with the sale of the house, and, as this demand was not satisfied, he began proceedings to recover the amount. The defendant denied liability on the ground that there had never been a legal and binding contract for the sale of the house entitling the plaintiff to claim a commission.

The county court judge held that such a contract had been entered into, which merely required implementation by the drawing of the formal documents of title. He therefore gave judgment in favour of the plaintiff for the amount claimed. The defendant appealed.

David Pennant for the defendant.
Meurig Evans for the plaintiff.

EVERSHED M.R. This has been to my mind a somewhat difficult case, and I confess to having undergone changes of view during the arguments; but on the whole my opinion is that we should not disturb the conclusion of the judge in the court below.

The first question to be determined is what were the terms of the contract between the defendant owner and the plaintiff, and upon that question, unfortunately, the judge has expressed no view. That, however, is understandable, because, having looked at the evidence, I do not think that there can really be any doubt about what the terms were. In his evidence in chief the plaintiff said that he received instructions to sell, and then he added: "Had to find purchaser willing and "able to pay." If the matter had rested there, various problems would have arisen which in the event do not arise; for in cross-examination he said: "I was asked by defendant "to find a buyer," and those words are placed by the judge in inverted commas. He goes on: "Neither of us mentioned "a person able and willing to purchase." The defendant stated: "Instructed [the plaintiff] to find purchaser." So that the judge may very well have said to himself that there was no doubt at all that the terms of the contract of agency were that the plaintiff was to find a purchaser. At any rate, I think it clear that that is what the evidence shows the bargain to have been.

The next question is, what, on that footing the plaintiff had to do in order to earn his commission? In my judgment, the answer is that he had to find—that is, produce for his principal—a purchaser who was bound at law to buy. That statement I base on the language of Lord Russell of Killowen and Lord Romer in the well-known case of *Luxor (Eastbourne) Limited* v. *Cooper* (1). The facts in that case were quite different from those here, and the observations to which I am about to allude and on which I rely were no doubt, strictly speaking, obiter. But the whole question of the relationship which properly exists between a house owner and an agent employed by him for the purposes of selling his property was considered most carefully by their Lordships, and I think that it would be the duty of this court on any view of it to follow the opinions which I am about to read. I only add that they have been followed in the sense which I attach to them by Hilbery J., in two recent cases of *Jones* v. *Lowe* (2), and *Bennett & Partners* v. *Millett* (3), to which may be added a decision of Slade J. in *Murdoch Lownie Ld.* v. *Newman* (4).

The first passage is in Lord Russell's speech (5): "The "position will no doubt be different if the matter has proceeded "to the stage of a binding contract having been made between "the principal and the agent's client. In that case it can be "said with truth that a 'purchaser' has been introduced "by the agent; in other words the event has happened upon "the occurrence of which a right to the promised commission "has become vested in the agent." I think that is all I need refer to. It should be stated that that conclusion followed a discussion of *George Trollope & Sons* v. *Martyn Brothers* (6), which Lord Russell criticized and in that context I think there can be no doubt that Lord Russell is expressing the view that where there is a bargain whereby the agent has to find a purchaser, or introduce a purchaser, then the agent, in order to earn the commission, must produce the result of a binding contract (I am quoting Lord Russell's language) made between vendor and purchaser. Then Lord Romer said (7), also after discussing the *Trollope* case (6): "The "question, then, to be determined upon the hypothesis that "I mentioned just now is this: Where an owner of property "employs an agent to find a purchaser, which must mean "at least a person who enters into a binding contract to

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(1) [1941] A. C. 108.
(2) [1945] K. B. 73.
(3) [1949] 1 K. B. 362.
(4) (1949) 65 T. L. R. 717.
(5) [1941] A. C. 126.
(6) [1934] 2 K. B. 436.
(7) [1941] A. C. 154.

"purchase, is it an implied term of the contract of agency "that, after the agent has introduced a person who is ready, "willing and able to purchase at a price assented to by the "principal, the principal shall enter into a contract with that "person to sell . . . ." I take those two passages as guiding me to the conclusion that I have indicated, namely, that in this case, where the bargain was that the plaintiff should find a purchaser he must to earn his commission at least produce a person bound at law to buy. Whether it is also necessary that his principal, the vendor, should be bound at law it is unnecessary for the present case to decide. But the plaintiff says, and, as I hold, and as the judge held, says with truth, that he has found a purchaser who is a person bound at law to buy.

That is, therefore, what I have called the next question, and the answer to it. And, as it has turned out, it depends first and last upon the view to be taken of two letters, one from the plaintiff or his firm to the purchaser and dated November 20, 1948, and the other addressed by the purchaser to the plaintiff's firm and dated November 23. Before November 20, there had been discussions, to a large extent by telephone, between the plaintiff agent and either the purchaser or his wife, in reference to the property of the defendant, who originally wanted 3,000*l.* for it. The purchaser and his wife had suggested a figure appreciably lower, but the agents had by about November 16 got them up to 2,750*l.*, and the question was, whether they could be pushed up a little further, to 2,850*l.* To that end the plaintiff agent had various communications orally with his principal, the defendant. At that stage there had never been anything signed or written by the purchaser or his wife.

On the other hand, it was said by the plaintiff in cross-examination that he intended a contract to be drawn up (by which I think he must mean a formal contract) and signed by each party. He went on: "Date for possession of house "vital term of contract." The purchaser's wife herself gave evidence that there had been some discussion (and the defendant agreed on this, though it was not clear exactly with whom or when) about the date of possession. It varied from one month to two months. At any rate, so far as I can see, there was never, so far, any contract either oral or written: that is to say, the parties at this stage had never become ad idem on this matter. But the agents, having seen the purchaser or his wife, and their own client, then wrote the first of the two vital letters, and it is to be noted that they got the defendant to come and see this letter and approve it before it was sent so that there is no question whatever but that the plaintiff was in writing this letter the hand of his principal, the defendant.

[His Lordship read the letters of November 20 and 23, 1948, and continued :] I think that the vital question is whether those two documents can be looked at together, and, if so, whether they constitute such a note or memorandum of contract as to bind the purchaser according to the principles of s. 40 of the Law of Property Act, 1925. I do not think that any oral or other contract was proved apart from what is found in these letters. If the two letters cannot be connected, it is manifest that the purchaser's letter of November 23 (which among other things, does not state the purchase price) cannot form a sufficient memorandum to bind him at law. My view is that we can read the two documents together as connected.

The general principle is thus stated, I think accurately, in Williams on Vendor and Purchaser (4th ed.), vol. 1, pp. 20 and 21 : " Here we may notice that, when it is sought to " establish a contract by letters which have passed between " different parties, the court will take into consideration the " whole of the correspondence which has passed, and will " not necessarily draw the line at any particular letter or " letters, which might have afforded evidence of a contract " if considered apart from the rest " ; and earlier, at p. 7, the learned authors had discussed the older and stricter rule that if two documents were to be read together, they must in terms be the one connected to the other ; but that, I think, is plainly not now the law. I think that clearly emerges from *Long* v. *Millar* (1), which was analysed by Russell J., in *Stokes* v. *Whicher* (2). I think that the observations in *Long* v. *Millar* (1) are indeed most pertinent to this case, for there the document which contained the terms had been signed by a purchaser, and all that the vendor had signed was a receipt stating, " Received of Mr. " George Long the sum of 31*l*. as a deposit on the purchase " of three plots of land at Hammersmith." If the vendor was to be bound, then his receipt had to be connected with the

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(1) (1879) 4 C. P. D. 450.

(2) [1920] 1 Ch. 411, 418.

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purchaser's letter in order that it might become a sufficient memorandum. It was pointed out that the 31*l.* might be any percentage of any purchase money. Therefore, it was not possible to calculate the purchase price there any more than it is here by the mere reference to 280*l.* as a "deposit." But this court came to the conclusion that they were entitled to read the receipt with the purchaser's letter. "*Long* v. *Millar* (1)," said Russell J. (2), "comes to this: that, if you "can spell out of the document a reference in it to some other "transaction, you are at liberty to give evidence as to what "that other transaction is, and, if that other transaction contains "all the terms in writing, then you get a sufficient memorandum "within the statute by reading the two together."

Applying those principles, I am clearly of opinion that we can, and must read together the letters of November 20 and 23, and, therefore, that if all the relevant terms are to be found in those two documents together, the purchaser, having signed the letter, was bound at law to purchase.

No question could have arisen were it not for the last paragraph in the first of the two letters relating to the question of possession. I have in mind the passage from the evidence to the effect that the date of possession was vital to the contract; nor do I forget that at a later stage, when the agents prepared a short note for the signature of each party, the date for completion, or for possession, which is the same thing, was left blank.

I think this in many ways a case which is very near the line; but, as already indicated, I am not prepared to come to a conclusion different from that of the judge, who in his brief judgment said: "I was of opinion on the facts of the "case and on consideration of the authorities cited that such "a contract"—that means a legally binding contract—"had "been entered into which merely required implementation "by the drawing up of the formal documents of title."

The judge heard the evidence, read this correspondence, and listened to the argument. If he had thought and concluded as a fact that it was a vital matter between the two parties that the date of possession should be fixed as part of the contract, then I think that his conclusion could not possibly have been so stated. The judge's conclusion postulated to my mind that he was of opinion on the facts that

(1) 4 C. P. D. 450.

(2) [1920] 1 Ch. 411, 418.

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neither party regarded the actual date of possession, or completion, which is the same thing, as vital. That is a matter of fact, and I think it a most important premiss to the rest of the matter. But, of course, we would not be bound to follow the judge's view if, upon a proper construction of the documents, we thought that they led to a different conclusion.

The question of the date of possession is prima facie the same thing as the question of the date of completion. The two may, of course, be different; but here they are intended to be the same; and it is well established that the date of completion or of possession is prima facie not of the essence of the contract. The parties can make it so, but if they do not, then, time not being of the essence, the law will import as a term of the contract that it is to be completed within a reasonable time, and thereafter either party in due course can, by appropriate means, make time of the essence.

This question of the date of possession (although, as my brother Denning has pointed out, in modern times no doubt of much greater significance than of yore) is prima facie not of the essence of the contract. The first thing to be noted is that the reference to the date of possession does not come in the early part of the agents' letter. If it had been regarded as, and intended to be, an essential term of the contract, it would have been natural to make reference to it earlier before asking for the deposit. The natural construction of the added paragraph about possession and the place which it takes in the letter show that the agents were really saying that they accepted the offer of 2,850*l.*; that time was not of the essence, but that, of course, the vendor must complete in a reasonable time; that the defendant suggested as a target date two months ahead; and that if that date were not suitable to the purchaser, the matter was open for discussion. In other words, it was left for the parties to agree, if they could, a suitable and convenient time which would comply with the obligation that completion should be within a reasonable time. That view, I think, is supported by the circumstance that when the purchaser sent his deposit he did not refer at all to the question of possession: he appears to have been content to accept the suggestion that the actual date could be discussed, and that if an earlier date could not be agreed he would be satisfied with two months. At any rate, he sent his deposit; and a man does not, as a rule, part with 280*l.* unless he really means that he has agreed to the bargain which is put to him.

It seems to me that, on the natural construction of the letter of November 20, the reference to possession was not having regard to its context and language made a term, and it was never agreed. I do not think that the other circumstances, including the fact that when little formal notes were prepared, a space was left blank for the date for possession, are sufficient to displace that view. These formal notes are, after all, not a form of contract such as would be drawn by a lawyer. It is also to be noted that in the letter which the plaintiff wrote on November 17, to which he referred when he wrote his letter of the 20th, he rejected the 2,750*l.*, stated that the defendant was expecting 3,000*l.*, asked the purchaser if he could go up to 2,850*l.*, but did not ever mention the question of possession.

All these matters lead me to the conclusion that the parties did not go out of their way to make time of the essence of the contract, and did not intend the date of completion and possession to be a vital term of the contract. They were content that that should take place at a reasonable time and be a matter for discussion.

For all these reasons—and it is a difficult case—I conclude that we should not disturb the decision of the judge below. These cases are always difficult; but I am, I confess, somewhat comforted in the present case at being able to reach that conclusion for this reason. In some of these cases—and one of the latest is *E. P. Nelson & Co.* v. *Rolfe* (1), the court has said that it was regrettable that the agent should be entitled to succeed. This is by no means such a case. It seems to me, when all the matters are examined, that it is very much the other way: if the defendant had been entitled to resist the agent's claim for commission, I think that it would have been the plaintiff estate agent who would have been entitled to sympathy. In other words, the defendant here has no merits so far as I can see, and I am therefore all the more pleased to say that he has not the law on his side either. I would dismiss the appeal.

DENNING L.J. I confess that I approach claims by estate agents from the point of view, which I am sure is the common understanding of men, namely, that, in the absence of express terms to the contrary, the commission of the agents is to be

(1) [1950] 1 K. B. 139.

paid out of the proceeds of sale. If the sale does not go through, the presumption is that no commission is payable. But in point of law if an agent succeeds in finding a person who actually enters into a binding and enforceable contract to purchase, and if that contract afterwards goes off by the vendor's default, the vendor is liable to pay commission.

In this case I have felt much doubt whether a binding and enforceable contract was made. The agent in the course of his evidence said that he intended a contract to be drawn up and signed by each party, and he said that the date of possession of the house was a vital term of the contract. In pursuance of this intention, he at a late stage drew up two formal letters but they were not signed. In those letters he left a vacant space for the date of possession, but it was not filled in. Indeed, no actual date for possession was ever agreed. So no formal contract was ever signed. The agent then turned round and relied upon the two informal letters of November 20 and 23 as being a binding contract. In the ordinary way they could not suffice because an agent, writing a preliminary letter to a purchser, should make it "subject to contract" so as to protect his client, the vendor. After all, the agent has no authority to sign a memorandum such as to satisfy the statute; and the ordinary practice of agents, as I have always understood it, is to write such letters "subject to contract."

But the vendor here cannot make anything of that point because he actually approved the letter of November 23, before the agent sent it off. That letter unfortunately did not contain the words "subject to contract." The result is that that letter, coupled with the reply, is just sufficient to make a binding and enforceable contract. Once the letters are found to constitute a binding and enforceable contract, the vendor is liable for commission, because it is clear that the sale went off by his fault: it went off because he changed his mind.

So, after considerable hesitation, I agree with my Lord that this appeal should be dismissed.

JENKINS L.J. I also agree. In order to establish his claim to have earned his commission, the plaintiff must show a binding contract for sale. That is a matter which has to be determined in this case largely on the correspondence. It is notoriously difficult to decide whether letters more or less informal in their terms do in fact constitute a binding contract

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or provide sufficient evidence of a binding contract. Giving the best consideration I can to the correspondence in this case, and in particular to the two vital letters dated November 20, 1948, from the plaintiff to the purchaser, and November 23, 1948, from the purchaser to the plaintiff enclosing the deposit, I come to the conclusion that though, as my Lord has said, this case is very near the line, those two vital letters do suffice to constitute a binding contract, with the result that the plaintiff thereby acquired, as Lord Russell put it in *Luxor (Eastbourne) Ld.* v. *Cooper* (1), a vested right to the commission of which he could not thereafter be deprived by the defendant's choosing to withdraw from the contract.

Accordingly, I agree that there is no sufficient ground here for differing from the conclusion at which the learned judge has arrived, which, in my view, is on the whole the right conclusion, and it follows that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co., for Myer Cohen & Co., Cardiff; Wrentmore & Son, for Phoenix, Walters & Co., Cardiff.*

(1) [1941] A. C. 108, 126.

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Followed. SMILEY *v.* TOWNSHEND [1950] 2 K. B. 311

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Jan. 12, 13, 26.
Somervell and Jenkins L.JJ. and Romer J.

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[Plaint No. E 357]

Landlord and tenant—Covenant to leave in repair—Demise of five rooms in dwelling-house—Demised premises left in bad decorative repair—Diminution of value of reversion—Cost of redecoration measure of damages—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

Where a tenant fails to repair demised premises in accordance with the covenants in his lease, the lack of repair may itself be evidence of damage to the reversion and the cost of effecting the necessary repairs may be evidence of the extent of that damage. It is not an invariable rule of law that in all cases in estimating the damage resulting from a breach of a covenant to repair it is necessary, having regard to s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, to place a value upon the reversion repaired

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and upon the reversion unrepaired and to treat the difference as the diminution in the value of the reversion. Such a method of calculation, while the right criterion to apply in most cases, is not appropriate in a simple case where the tenancy is of a few rooms in a house and where there can be no question of the sale of the rooms apart from the house. In such a case, if there is evidence that the repairs which the landlord has done (being repairs within the covenant) were no more than were reasonably necessary to make the rooms fit for reoccupation or reletting, the proper cost of the repairs may be regarded prima facie as representing a diminution in the value of the reversion due to the tenant's breach of covenant.

By a tenancy agreement of March 25, 1943, premises consisting of four rooms on the first floor and one on the ground floor of a house were let to the defendant for one year from that date. The tenant covenanted to keep, and at the determination of the tenancy to deliver up, the interior of the premises in good and tenantable repair. When the tenant gave up possession in 1949, the landlord found the rooms in a bad state of decorative repair, had them redecorated throughout, and relet them. The landlord claimed the cost of those redecorations. The county court judge having given judgment for the landlord, the tenant contended that there was no evidence of damage to the reversion and, accordingly that the landlord should, having regard to s. 18, sub-s. 2, of the Landlord and Tenant Act, 1927, not have been awarded more than nominal damages.

Held, dismissing the appeal, that there was evidence on which the judge could hold that the cost of executing the repairs was the measure of the damage to the reversion.

Hanson v. *Newman* [1934] Ch. 298, and *Salisbury* (*Marquess*) v. *Gilmore* [1942] 2 K. B. 38, explained. *Joyner* v. *Weeks* [1891] 2 Q. B. 31, considered. Dictum of Lynskey J. in *Landeau* v. *Marchbank* [1949] 2 All E. R. 172, 175, disapproved.

APPEAL from Barnet county court.

The plaintiff, John Wilfred Jones, claimed damages for breach of a covenant by the defendant tenant, Herxheimer, contained in a tenancy agreement dated March 25, 1943. The following statement of facts is taken substantially from the judgment of Jenkins L.J. The premises comprised in the tenancy agreement consisted of four rooms on the first floor and one room on the ground floor of No. 9 Elgin Road, Alexandra Park, Wood Green, Middlesex, with certain ancillary rights. They were thereby let to the tenant for one year from March 25, 1943, at the yearly rent of 109*l*. 4*s*. 0*d*. The tenant covenanted with the landlord as follows: by cl. 2, sub- cl. 4, "To keep the interior of the premises and the "doors windows and the fittings and fixtures (including "those specified in the schedule hereto) in good and tenantable

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" repair and the stairs and staircase leading from the ground " floor and the landing and the carpets thereon clean and " dusted " ; and by sub-cl. 10, " At the determination of the " tenancy to deliver up the premises together with the stoves " and grates and all landlord's fixtures and the fittings and " fixtures specified in the schedule hereto in good and tenantable repair in accordance with the tenant's covenants herein " contained and with all locks keys and fastenings complete."

The tenant remained in possession of the five rooms in question on the terms of the tenancy agreement after the expiration of the one year's tenancy thereby granted. On May 19, 1949, he gave up possession to the landlord, who had become the owner of the freehold of No. 9 Elgin Road, subject to the tenant's tenancy of the five rooms.

The tenancy having thus determined, the landlord sued him in the Barnet county court for damages for breach of his covenants to keep and deliver up the premises in repair. The damages claimed by the landlord amounted to 71*l.* 15*s.* 6*d.*, that figure being supported by a schedule of dilapidations prepared by his brother-in-law, a builder and decorator. The repairs specified in the schedule were all decorative repairs of a usual character, such as painting and repapering.

It was held by the county court judge, and not now disputed, that the landlord could only rely on the covenant to deliver up in repair, for no notice under s. 146 of the Law of Property Act, 1925, had been given with respect to any breach of the covenant to keep in repair. It was, however, not in dispute that the tenant had broken both covenants, and the extent of the landlord's claim was the same whether founded on both covenants or only on the covenant to deliver up in repair.

At the trial evidence was given for the landlord by the landlord himself and by the builder. The landlord gave evidence substantially to the effect that, on the tenant's vacating, he inspected the rooms, found them in a bad state of repair, decided to have the whole place redecorated, and instructed the builder to prepare a specification and do the work. In cross-examination he said that he had let the first floor referred to in the tenancy agreement furnished at 3*l.* a week, having had it entirely redecorated. He also said that he understood that the tenant had to leave the premises " in habitable condition so that anyone could move in."

The builder gave evidence substantially to the effect that, when the tenant vacated, the place was dirty ; that he should say the rooms had not been redecorated for at least 10–12 years; that all the work in his schedule had been carried out; and that he had been paid 50*l.* generally on account. It was put to him in cross-examination that 42*l.* would be a fair price for all the work in his schedule, but he denied it. Neither witness referred to the question of damage to the reversion, nor was the point put to either of them in cross-examination.

It was conceded for the landlord that the top landing and stair wall, repairs to which, amounting to 21*l.*, had been included in the builder's schedule, were not within the covenant; and that had the effect of reducing the landlord's claim to 50*l.* 15*s.* 6*d.*

The only witness called for the tenant was a surveyor. He put the cost of the repairs required to comply with the covenant at 42*l.*, or 32*l.* without the top landing and stairway. He placed the following values on the premises: "Value "of whole premises with a sitting tenant in one part" (meaning presumably the part which had been comprised in the defendant's tenancy)—" 2,250*l.* Value of part occupied "by defendant—1,500*l.* Value with complete vacant posses-"sion—3,000*l.*"; and expressed the view that the repairs in question, which were purely decorative, would not affect the value of the premises. In cross-examination he admitted that "the price would be affected by structural and, if very "bad, decorative condition." In re-examination he expressed the view that the "letting value" was not "affected by the "state of decorative repair in this case."

In his judgment, the county court judge, after stating the nature of the claim, continued as follows: "There was "no question but that when the premises were handed over "the covenants had not been complied with. There is evidence "that apparently nothing was done to them for a period of "from 10–12 years. The only covenant in question is that "to deliver up the premises in repair. The landlord cannot "pray in aid the covenant to keep in repair: he gave no "notice under s. 146 of the Law of Property Act, 1925. "The tenant relied on *Landeau* v. *Marchbank* (1). No "evidence was given by the landlord of any damage to the "reversion. The case referred to is an authority for the "proposition put forward by the tenant that the measure "of damages must not exceed damage to the reversion, if

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(1) [1949] 2 All E. R. 172.

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"any. Neither the landlord nor the builder had addressed "their minds to it and no expert was called (except by tenant "who called in a surveyor who said in this particular case "no damage to reversion—small purely decorative repair) "and to that extent I am in agreement with Mr. Lawrence "that there was no evidence of damage to the reversion. "But I do feel that, though the evidence by the landlord "was not given with that in mind, in this particular case "there must be some damage to the reversion. If the landlord "had taken possession of the premises himself, clearly there "would be some damage; he would have to do work himself "or keep them in bad state. If he did not do anything to "the premises, they would deteriorate. There is abundant "evidence reversion was damaged. Lynskey J. said it must "depend on circumstances.

"I am satisfied there is damage to the reversion and the "damage will be the proper cost of repair. In Hill and "Redman (10th ed.) p. 739, *Joyner* v. *Weeks* (1) is still relied "on. Measure of damages is still as it was in *Joyner* v. "*Weeks* (1). The tenant's surveyor is qualified to assess "the amount of the cost of repairs. He was under a "disadvantage in that he did not see the premises before the "work was done. I accept his approach to the assessment "on the Scale ROD.1. His figure for the whole is 42*l.* "As to the builder's evidence, I feel that the whole house was "being done up from top to bottom. I give judgment for "the landlord for 36*l.*" The tenant now appealed.

John Lawrence for the tenant. Damages for breach of a covenant in a lease to repair and deliver up in repair cannot, having regard to s. 18, sub-s. 2, of the Landlord and Tenant Act, 1927 (2), exceed the amount by which the value of the

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(1) [1891] 2 Q. B. 31.

(2) Landlord and Tenant Act, 1927, s. 18, sub-s. 1: "Damages "for a breach of a covenant "or agreement to keep or "put premises in repair during "the currency of a lease, or to "leave or put premises in repair "at the termination of a lease, "whether such covenant or agreement is expressed or implied, "and whether general or specific, "shall in no case exceed the "amount (if any) by which the "value of the reversion (whether "immediate or not) in the "premises is diminished owing "to the breach of such covenant "or agreement as aforesaid; and "in particular no damage shall "be recovered for a breach of "any such covenant or agreement "to leave or put premises in "repair at the termination of a "lease, if it is shown that the "premises, in whatever state of

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reversion is diminished. If the property could be sold in its unrepaired condition for as good a price as if it were repaired, then only nominal damages are obtainable. Before the Act of 1927 a landlord could recover damages for breach of covenant to deliver up the premises in repair notwithstanding that the building was to be immediately demolished: *Joyner* v. *Weeks* (1). The tenant contends that there was here no evidence before the county court judge to support his finding that there had been damage to the reversion.

Since s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, came into operation, when a landlord claims damages for breach of a covenant to repair, there are three things he must prove: first, that there has been a breach of the covenant to repair; secondly, the cost of doing the repairs; and, thirdly, that the failure to repair has resulted in damage to the reversion. The correct method of assessing the damage to the reversion was laid down by Luxmoore J. in *Hanson* v. *Newman* (2): it is to ascertain the value of the property in its unrepaired state at the date of reverting and the value which the property would then have had if there had been no breach of covenant. The amount of damage sustained by the landlord is the difference between the value of the property as it stands and the value it would have had if the tenant had carried out his obligations under the covenants in the lease. The landlord could have called evidence to show that the cost of executing those repairs was in fact equal to the damage to the reversion. No such evidence was given. There is no evidence that the landlord would have received a lower rent if he had relet the premises without first redecorating them. [Counsel referred to *Salisbury* (*Marquess*) v. *Gilmore* (3), *Portman* v. *Latta* (4), and *Landeau* v. *Marchbank* (5).]

Bibby Trevor for the landlord. It is submitted, first, that this is a question of fact. There was evidence from which the county court judge could draw the inference that there was damage to the reversion. The judge was applying the common-law rule applied in *James* v. *Hutton* (6): see per Lord Goddard C.J. The rule in *Joyner* v. *Weeks* (1) is still

"repair they might be, would "at or shortly after the termination of the tenancy have been "or be pulled down, or such "structural alterations made "therein as would render valueless the repairs covered by the "covenant or agreement."

(1) [1891] 2 Q. B. 31.
(2) [1934] Ch. 298.
(3) [1942] 2 K. B. 38.
(4) [1942] W. N. 97.
(5) [1949] 2 All E. R. 172.
(6) Ibid. 243, 246.

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good law except so far as it has been modified by s. 18 of the Act of 1927. It is submitted that whether on a sale the property unrepaired would fetch less than the property in a repaired state is not the only test of damage to the reversion. The earlier authorities are all distinguishable, as there a whole house was in question. Here the demised premises consist of only a few rooms in a house. It is a matter of necessary inference, where a landlord receives back rooms which have not been repaired by a tenant in accordance with his covenants, that if he intends to relet them there is damage to the reversion. In *Salisbury* (*Marquess*) v. *Gilmore* (1) there was evidence that the only value of the premises was as a site. There was no evidence that failure to repair had resulted in any diminution in the value of the reversion. Here, the county court judge has said, there was abundant evidence of damage. Again, in *Landeau* v. *Marchbank* (2) there was no evidence of damage to the reversion. The test laid down in *Hanson* v. *Newman* (3) is not applicable where the premises are only a few rooms in a house. There was evidence on which the judge could find damage, and the appeal should be dismissed.

John Lawrence in reply. The county court judge never brought his mind to bear on the requirements of s. 18 of the Act of 1927. There was no evidence on which he could hold there had been damage to the reversion.

Cur. adv. vult.

Jan. 26. JENKINS L.J. read the following judgment of the court: The question in the appeal is in substance whether, having regard to s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, there was any evidence on which the county court judge could properly hold the landlord here entitled to more than merely nominal damages. [His Lordship stated the facts substantially as above recited, and continued]: It is contended for the tenant that in the present case there was no evidence of any damage to the reversion, and, consequently, that the county court judge ought, as a matter of law, either to have dismissed the action, or at most, to have awarded the landlord a merely nominal sum.

The statement in the earlier part of the judgment of the county court judge that "no evidence was given by the land-

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(1) [1942] 2 K. B. 38.

(2) [1949] 2 All E. R. 172.

(3) [1934] Ch. 298.

"lord of any damage to the reversion," read literally and out of its context, seems at first sight inconsistent with a decision in the landlord's favour. But it is plain from what follows that the county court judge did not mean by this that there was no evidence on which damage to the reversion could be held to have been proved, but only that the evidence for the landlord did not refer in so many words to the question of damage to the reversion.

It was forcibly contended before us by Mr. Lawrence, for the tenant, that there was no evidence that the reversion had been damaged to the extent of 36*l.* or at all by the want of repair; that the evidence on which the county court judge held that the proper cost of putting the premises in repair was 36*l.* was not even prima facie evidence of damage to the reversion to that or any amount; and that the only evidence before him directed to the question of damage to the reversion was the evidence of the tenant's surveyor to the effect that there was no such damage. Mr. Lawrence accordingly submitted that, in view of s. 18 of the Landlord and Tenant Act, 1927, the county court judge's decision was wrong in law as the landlord had wholly failed to prove any recoverable damages. In support of his contention Mr. Lawrence cited a number of authorities to which we should next briefly refer.

In *Hanson* v. *Newman* (1) an action had been brought in 1932 for possession of the premises, comprised in a lease for a term expiring in 1938, for breach of the repairing covenants therein contained. The plaintiff had recovered judgment in default of defence for possession and damages to be assessed by a master. The proceeding before the court was an appeal by the defendant from the master's assessment of the damages, and the question in issue was whether the master, who had assessed the damages in accordance with the terms of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, at the sum found by him to represent the amount by which the reversion in possession at the date of the forfeiture of the lease (i.e., the date of the writ) had been diminished by the defendant's breaches of covenant, ought to have allowed a claim by the defendant to set off against the amount so assessed the difference between the value of the reversion in possession at the date of the forfeiture and its value at the same date as a reversion expectant upon the expiration of the term in 1938.

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(1) [1934] Ch. 298.

Luxmoore J. and the Court of Appeal held that there could be no such set-off. Luxmoore J. in the course of his judgment said (1): "Under the law before the Landlord and Tenant "Act, 1927, was passed, a landlord could recover by way "of damage at the termination of his term the actual cost "of executing the repairs required to fulfil the covenant. "The Landlord and Tenant Act, 1927, has not changed the "law in that respect; all that it has done is to impose a "limit on the amount of those damages. The material "section to be considered is s. 18 of the Landlord and Tenant "Act, 1927."

Luxmoore J. read s. 18, sub-s. 1, and went on to discuss what was meant in the section by the phrase "reversion "immediate or not," concluding that the word "reversion" was used "as referring, in the case where the lease has "terminated, to the land which has reverted." Then he said this on the effect of the section on the amount of damages recoverable (2): "What the section provides for is that the "damages for breach of covenant on the termination of a "lease are not to exceed the amount by which the value of "the reversion, whether immediate or not, in the premises "is diminished owing to the breach of such covenant or "agreement; that is, you take the value of the reversion "as it is with the breach—the value of the property which "has reverted as it is subject to the breach—and you take "it as it would be if there were no breach, and you provide "that the amount of damage shall not exceed the amount "by which the value of the property repaired exceeds the "value of the property unrepaired."

In the Court of Appeal Lawrence L.J. and Romer L.J. both expressed full approval of Luxmoore J.'s judgment, and Lawrence L.J., in particular, adopted the passage to which we have just referred, quoting it at length and saying that he "could not express it better."

In *Salisbury* (*Marquess*) v. *Gilmore* (3), premises in New Bond Street had been let to the defendant for a term of fourteen years from September 29, 1925. The tenant had asked for a new lease in 1937 but was then informed that the plaintiff landlords intended to pull the premises down (which intention

(1) [1934] Ch. 298, 300.
(2) Ibid. 302.
(3) [1942] 2 K. B. 38.

would have been an answer to any claim by the tenant for a new lease under s. 5 of the Landlord and Tenant Act, 1927, and prima facie a defence under s. 18, sub-s. 1, to any claim against the tenant for damages for non-repair at the termination of the lease). In 1939 the tenant vacated the premises and left them out of repair, being still under the impression that they were to be pulled down. Thereafter, the plaintiffs, having, as they said, abandoned their intention to pull down the premises, claimed damages for breach of the covenants to repair. The evidence showed that the plaintiffs had not abandoned their intention to pull down the premises until a date after the termination of the tenancy.

The actual question in the case was not concerned with the quantum of damages recoverable under s. 18, sub-s. 1, but was simply whether, in the circumstances which we have stated, the defendants were not precluded by the latter part of the sub-section from recovering any damages at all, and the Court of Appeal (reversing Hilbery J.) held that they were so precluded. But MacKinnon L.J. in the course of his judgment did in fact deal with the necessity of proof of damage to the reversion under s. 18, sub-s. 1, and expressed the view that there was no evidence at the trial of any diminution in the value of the reversion by reason of any breach of covenant to repair or yield up in repair.

Mr. Lawrence relied on the following passage in MacKinnon L.J.'s judgment (1): "The only evidence as "to breach was under (*b*) the covenant to deliver up in "repair, upon a survey and schedule of dilapidations made "after such delivery up. As to the effect of this breach "on the value of the reversion the first surveyor could only "say that the depreciation was 'the cost of doing the "'repairs,' but on cross-examination said 'I am not in a "'position to answer' (as to the depreciation) 'because "'it is a question of the value of the premises and as a "'surveyor assessing dilapidations I was only concerned "'with the cost of making the repairs.' The other surveyor, "on being asked what was the depreciation, answered: "'I think the cost of the work is the only possible criterion.' "But he also said, in cross-examination, that the only real "value of the premises was the site value, and 'you would "'get as much for the site as for the site with the building "'on it.' On this I am clear that the learned judge was

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(1) [1942] 2 K. B. 48.

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" wrong in that passage of his judgment in which he says: " ' I accept the evidence of the plaintiffs' witnesses . . . . " ' I am satisfied that the cost of making good the want of " ' repair is as nearly as it can be assessed the same as the " ' diminution in the value of the reversion resulting from the " ' breaches of covenant to yield up in repair.' There was " no evidence of any diminution of value in the reversion, " and the judgment, if given for the plaintiffs, should have " been for nominal damages only."

Portman v. *Latta* (1), concerned premises let as a residence in 1921 under a lease which was terminated in 1940, and Croom-Johnson J. found on the facts that at the latter date they were unlettable as a private residence, but that it would not be in accordance with good estate management to pull them down, and that they might be used as premises for institutions, etc. In dealing with the amount of damages recoverable under s. 18, sub-s. 1, in these circumstances, the judge rejected the evidence of certain expert witnesses to the effect that the cost of the repairs was necessarily the amount by which the value of the reversion had been diminished, and assessed the damages by reference to the difference between the value of the property repaired and its value unrepaired.

Lastly, in *Landeau* v. *Marchbank* (2), a case in which on the determination of a lease the premises had been sold at an admittedly good price for conversion into two flats and two maisonettes, Lynskey J. rejected a calculation of damages based on the cost of effecting repairs in accordance with the covenants less the cost of those rendered valueless by the contemplated conversion, and held that there was no evidence of any diminution in the value of the reversion, and that the plaintiff was entitled to nominal damages only.

Mr. Lawrence relied in particular on a passage (3) in which the judge expressed the view that " the fact that repairs are " necessary is not in itself even prima facie evidence of damage " to the value of the reversion." With the passage just quoted, as a general proposition, we are unable to agree. We find nothing in the earlier authorities to justify the conclusion, as a matter of law, that in no case and in no circumstances can the fact that repairs are necessary, and the cost of those repairs, be taken as at least prima facie

(1) [1942] W. N. 97.

(2) [1949] 2 All E. R. 172.

(3) Ibid. 177.

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evidence of damage to the value of the reversion and of the extent of such damage. There must be many cases in which it is in fact quite obvious that the value of the reversion has, by reason of a tenant's failure to do some necessary repair, been damaged precisely to the extent of the proper cost of effecting the repair in question. Nor do we understand the Lords Justices in *Hanson* v. *Newman* (1) as purporting to lay down an invariable rule of law to the effect that in all case and in all circumstances the procedure of placing values on the reversion repaired and the reversion unrepaired, and ascertaining the difference, must necessarily be gone through in order to ascertain the diminution in the value of the reversion attributable to the want of repair. Nor do we regard MacKinnon L.J. in *Salisbury* (*Marquess*) v. *Gilmore* (2) as intending to do anything more than to hold that, on the evidence tendered by the plaintiffs in that particular case, the cost of effecting the repairs could not be regarded as any index of the diminution (if any) in the value of the reversion which the want of repair had occasioned.

In the present case the "reversion" for the purposes of s. 18, sub-s. 1, consists simply of the four first-floor rooms and one ground-floor room formerly comprised in the defendant's tenancy, i.e., not a whole house but merely a set of rooms in a house: *Hanson* v. *Newman* (1). The matter is thus uncomplicated by any question of site value such as materially affected the evidence regarding the New Bond Street premises in *Salisbury* (*Marquess*) v. *Gilmore* (2). Nor is there here any question of change of user (as in *Portman* v. *Latta* (3)) or of sale and physical alteration (as in *Landeau* v. *Marchbank* (4)).

In the present case, the landlord having resumed possession of five rooms in his house which had been let for residential purposes, and intending to use or re-let them for residential purposes, found that, through the tenant's breach of covenant, it was necessary for him to do certain repairs to the rooms in order to put them in what he considered a fit state for occupation or re-letting for residential purposes. Accordingly, he spent money on effecting those repairs which he would not have had to spend if the covenant had been duly performed.

In such a case, if there is evidence that the repairs done, being repairs within the covenant, were no more than was

(1) [1934] Ch. 298.
(2) [1942] 2 K. B. 38.
(3) [1942] W. N. 97.
(4) [1949] 2 All E. R. 172.

reasonably necessary to make the rooms fit for occupation or re-letting for residentail purposes, we fail to see why the proper cost of those repairs should not be regarded prima facie as representing a diminution in the value of the reversion due to the tenant's breach of covenant, being money which the landlord, acting as an ordinary prudent owner, had to spend on the property owing to the breach and would not have had to spend but for the breach.

That the repairs here in question were within the covenant is not in dispute. There was clearly evidence on which the county court judge could find, and we think it plain from his judgment that he intended to find, that the 36*l*. at which he assessed the damages represented the proper cost of repairs, within the covenant, which were reasonably necessary to make the five rooms fit for occupation or re-letting according to ordinary standards. The sum of 36*l*. is certainly on the face of it a moderate estimate of the cost to be expected in these days of reasonably necessary decorative repairs to five rooms which have had nothing done to them for 10–12 years.

The evidence of the tenant's surveyor as to the capital values of the whole house and of the part let to the defendant seems to us to be beside the point. There could be no question as a practical matter of a sale of the five rooms let to the tenant (which, as we have said above, constitute the reversion) separately from the rest of the house. The surveyor's intention presumably was to show that there was no diminution in the value of the reversion according to the calculation prescribed in *Hanson* v. *Newman* (1). That calculation is no doubt the right criterion to apply in many if not most cases, and we do not for a moment intend to cast any doubt on its validity as a measure of the damages recoverable under s. 18, sub-s. 1, in cases to which it is appropriate. But we certainly deprecate its introduction as a sine qua non into all cases, including a small and simple case like the present concerned with a letting of some of the rooms in a house, where it becomes a purely hypothetical calculation wholly removed from the practical realities of the matter. Nor do we think that the county court judge was necessarily bound to accept the surveyor's assertion in re-examination to the effect that the want of repair did not affect the letting value of the premises, if he was satisfied, on the evidence as a whole, as

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(1) [1934] Ch. 298.

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we think that he clearly was, that the repairs of which he assessed the proper cost at 36*l.* were reasonably necessary to make the five rooms fit, according to ordinary standards, for occupation or re-letting for residential purposes.

We think that the judgment is open to criticism where it states that : " in Hill and Redman (10th ed.) p. 739, *Joyner* " v. *Weeks* (1) is still relied on," and that " the measure of " damages is still as it was in *Joyner* v. *Weeks* (1)." This is only true in the sense that up to the limit imposed by s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927 (i.e., the amount (if any) by which the value of the reversion has been diminished) the measure of damages for breach of a repairing covenant is still the cost of executing the repairs required to fulfil the covenant : see *Hanson* v. *Newman* (2) ; and in Hill and Redman (10th ed. p. 739) *Joyner* v. *Weeks* (1) is actually only cited in treating of the law as it stood before the Act of 1927.

This criticism does not, however, affect the result, as it is clear from the rest of the judgment that the county court judge did in fact apply the test of damage to the value of the reversion, and held that that damage amounted to 36*l.* For the reasons above stated we are of opinion that, in the circumstances of the present case, there was evidence on which the county court judge could so hold, and that he committed no error of law in doing so.

We would accordingly dismiss the appeal.

Appeal dismissed.

Solicitors : *E. E. Pugh ; Hardman, Phillips and Mann.*

B. A. B.

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(1) [1891] 2 Q. B. 31.

(2) [1934] Ch. 298.

WEST MERSEA URBAN DISTRICT COUNCIL *v.* FRASER.

1950
Apr. 17

Lord Goddard C.J., Morris and Finnemore JJ.

Water—Supply to premises for domestic purposes—House-boat moored on mud flat—Supply pipe connected to undertakers' main—Demand for supply by owner of house-boat—Refusal by undertakers—Whether house boat " premises " entitled to supply—Water Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 42), *sch. III, pt. VII, para.* 30, *sub-para.* 1.

By permission of the owner of certain mud flats, a house-boat had been moored there for several years, but no specific site had been allotted to it. The house-boat was connected to the water-undertakers' main by a flexible supply pipe provided by its owner, the pipe being in compliance with the requirements of the Water Act, 1945, and with the by-laws issued by the undertakers. The owner of the boat made a demand for a supply of water for domestic purposes to it which was refused by the undertakers on the ground that the boat was not "premises" within the meaning of that word in para. 30 (I.) of pt. VII of sch. III to the Water Act, 1945.

An information was preferred by the owner of the boat against the undertakers, charging them with making default in furnishing a supply of water.

Held, that there was a sufficient element of permanency in the site on the flats where the house-boat was moored to constitute the boat "premises" in respect of which its owner was entitled to demand a supply of water for domestic purposes, and that the undertakers were guilty of a default in refusing the demand for a supply.

Case stated by Essex justices.

An information was preferred by the respondent, Florence Fraser, against the appellants, West Mersea Urban District Council as the water undertakers for the district concerned, alleging that the council on and from September 2, 1949, made default in furnishing a supply of water for domestic purposes to certain premises namely a house-boat called the Sea Horse, Coast Road, West Mersea, the prosecutor being entitled to demand and having demanded such a supply, contrary to s. 120 of the Public Health Act, 1936, as amended by sch. IV to the Water Act, 1945.

At the hearing before the justices the following facts were proved or admitted: the prosecutor had duly complied with Part X of sch. III to the Water Act with respect to the laying of a supply pipe and tender of the water rate, before making a demand for a supply. She had duly demanded a supply of water for domestic purposes to the house-boat, which demand was refused by the council.

The house-boat had at all material times lain in a mud-berth at Coast Road, West Mersea, and the prosecutor paid to one Wyatt 20*l*. a year under an oral arrangement by which he granted her permission to keep the house-boat on saltings on his property. Normally, the house-boat, which was about 106 feet long, floated at high tide, but in a recent gale it had moved some 20 yards inland up the creek in which it lay. Under the arrangement between the prosecutor and Wyatt, permission was merely given for the house-boat to remain on the mud in the creek without any precise site being allotted to it.

The site of the house-boat had been assessed for purposes of general rate, and the boat was rated as premises for the payment of water rate from 1944 to February, 1949. Water rate had been demanded by the council and paid during that period.

It was contended on behalf of the council that the house-boat did not constitute " premises " for the purpose of s. 30, sub-s. 1 of Part VII of sch. III to the Water Act, 1945 (1).

For the prosecutor, the contrary was contended.

The justices were of opinion that the contention for the prosecutor was correct, and they accordingly convicted the council and imposed a fine of one pound with ten guineas costs. The council appealed.

Hines for the council. The justices were wrong in holding that the house-boat constituted " premises " within the meaning of s. 30, sub-s. 1 of Part VII of sch. III to the Water Act, 1945. The house-boat was not " premises." It was simply a chattel and could only amount to premises if it were attached to the site on which it rested in such a way to come within the definition of land in s. 59, sub-s. 1 of the Act. In this case the justices have found that the house-boat had no particular site allotted to it, and the informal arrangement made by the prosecutor with the owner of the creek was at most a licence and created nothing in the nature of an interest in or right over the land on which the house-boat rested. If it had been securely fixed and anchored so that it lay in one berth, and the agreement with the landowner had been for the exclusive possession of the site by the prosecutor, the position might be different. The absence of fixation and of the allocation of a definite site shows that the house-boat retained its character as a chattel. [He referred to *Reg.* v. *Leith* (1), *Reg.* v. *Morrison* (2), and *Westminster City Council* v. *Southern Railway Co.* (3).]

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(1) Water Act, 1945, sch. III, Part VII, para. 30, sub-para. 1: " An owner or occupier of any " premises within the limits of " supply who has complied in " respect of those premises with " the provisions of Part X of this " schedule with respect to the " laying of a supply pipe and " payment or tender of the water " rate shall be entitled to demand " and receive from the undertakers " a supply of water sufficient for " domestic purposes for those " premises . . . ."

Sub-paragraph 2: " . . . . if " the undertakers make default " in furnishing a supply of water " for domestic purposes to a " person who is entitled to demand " and has demanded such a " supply, ... they shall . . . . " be liable to a fine . . . . "

Water Act, 1945, s. 59, sub-s. 1: " ' Premises ' includes ' land ' and " ' Land ' includes any interest " in land and any easement or " right in, to or over land."

Garland for the prosecutor. The decision of the justices was right. The word "premises" in the Water Act, 1945, is meant to have a very wide meaning, since the Act was intended not to restrict the water supply but to make water abundantly available all over the country. "Premises" in the Act means anything which in the ordinary use of the English language could be included in the term, and to that is added by the definition in s. 59—land, or any interest in land. In *Andrews* v. *Andrews and Mears* (4), it was agreed that "premises" might include a ship.

Hines in reply.

Lord Goddard C.J. In my opinion this appeal fails. Before referring to the facts, I will briefly refer to the relevant provisions of the Water Act, 1945. It is provided in Part VII of sch. III, para. 1, that "The undertakers shall lay any "necessary mains and bring water to any area within the "limits of supply if they are required to do so by such number "of owners and occupiers of premises in that area who require "a supply of water for domestic purposes . . . .," provided that the rates are sufficient; I need not read the whole of that paragraph.

By para. 30, sub-para. 1, of the same schedule: "An owner or "occupier of any premises within the limits of supply who has "complied in respect of those premises with the provisions of "Part X of this schedule with respect to the laying of a supply "pipe and payment or tender of the water rate shall be entitled "to demand and receive from the undertakers a supply of water "sufficient for domestic purposes for those premises." There is provision for a penalty if the undertakers fail to supply the water.

By Part X, para. 40 of the schedule, "An owner or occupier "of any premises within the limits of supply who desires to "have a supply of water for his domestic purposes from the

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(1) (1852) 1 E. & B. 121.
(2) Ibid. 150.
(3) [1936] A. C. 511.
(4) [1908] 2 K. B. 567.

"waterworks of the undertakers, shall, subject as hereinafter "provided, comply with the following requirements: (*a*) he "shall give to the undertakers fourteen days' notice of his "intention to lay the necessary supply pipe and at, or before, "the time of giving such notice shall pay or tender to them "such sum as may be payable in advance by way of water "rate in respect of his premises; and (*b*) he shall lay the "supply pipe at his own expense, having first obtained, as "respects any land not forming part of a street, the consent "of the owners and occupiers thereof."

By s. 17, sub-s. 1 of the Act: "(1.) Statutory water under-"takers may make by-laws for preventing waste, undue "consumption, misuse, or contamination of water supplied "by them." Sub-section 2: "By-laws under this section "may include provisions—(*a*) prescribing the size, nature, "materials, strength," and so forth of any water fittings,—which would, no doubt, include a supply pipe connected with the main—and forbidding the use of any water fitting on certain grounds which I need not read.

The case finds that the prosecutor had complied with all the requirements of Part X of sch. III with respect to the laying of a supply pipe and tender of the water rate. There is no suggestion that the pipe did not comply with the by-laws.

[His Lordship referred to the facts as stated, and continued:] The finding that the house-boat was rated as premises for the purposes of a water rate from 1944 to February, 1949, and that a water rate was demanded by the council and paid during that period would not, of course, be conclusive against the council, but it may throw some light on the subject, because if in fact they were not under an obligation to supply water they could discontinue the supply and defend any proceedings brought against them for not having given a supply. The justices' finding was that the house-boat in the circumstances could fairly be described as "premises" within the meaning of the Act, and the question which they had to decide was partly one of law and partly one of fact.

There is no definition of the word "premises" in the Act, but it is stated in s. 59 that it includes land. The fact that it does so does not mean that it is defined as land. The word "premises" as used in the Act is obviously not a term of art: it means some form of property used as domestic premises; and, speaking for myself, it seems to me that, before the under-

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takers can be required to provide water to any particular premises, there must be a site—some degree of permanency.

We find here that the house-boat has lain in this creek at least since 1944, because between 1944 and 1949 it was supplied with water. The fact that the prosecutor did not stipulate with Wyatt as to the precise site which it was to occupy does not seem to me to be conclusive in any way. Wyatt said in effect: "You may put your house-boat on the mud in my creek," and the prosecutor selected the place and put the house-boat there. It must have been moored because, otherwise, it would have shifted every time the tide rose and fell. If it had not been moored, I should think that by this time it would either have been high and dry at the top of the creek or outside it and probably at the bottom of the North Sea. There must have been some degree of mooring, and of course the boat must have been moored in such a way that it could rise and fall with the tide. The fact that it is sometimes so many feet higher and sometimes so many feet lower again does not seem to me to be in any way conclusive. It obviously occupied a site where it was moored, and there was that degree of permanency. The boat being in that position, the prosecutor showed that she intended it to remain there by the fact that she laid a supply pipe there to connect with the main at her own expense in compliance with the Act, clearly indicating an intention to keep the house-boat in that position.

I do not lay particular stress, but I think that some should be laid, on the fact that the prosecutor is rated in respect of her house-boat, for the rating authority regard it as a hereditament from the fact that it occupies this particular position in the mud. It is true that there has to be a flexibility in the pipe which connects the house-boat with the main. Otherwise, it might be broken every time the boat rose or fell with the tide. But the pipe was approved by the undertakers, and the prosecutor complied with all the requirements of the Act in relation to the pipe. The council have the power under s. 17 of the Act to make by-laws which would have enabled them to object to or prescribe any particular fitting; but they did neither. Whether the whole length of the pipe is fixed or flexible does not seem to be conclusive either way.

On the facts as found by the justices, it seems to me, they could find that these were premises within the meaning of the Act. As I said, it is partly a question of law, and the point of law in the case seems to be that, before this house-boat can be "premises," there must be an element of permanency in the site which it occupies. That having been found, and it being also found that the house-boat is used for domestic premises at the particular point where it lies, I think that the justices were entitled to hold as they did. The point that seems to have been relied on as showing that these were not permanent premises was that on one occasion in a recent gale the house-boat moved; that is to say, I suppose, it tore its moorings and moved some twenty yards up the creek. I do not see that that destroys the element of permanency any more than if a barn or toolshed standing in a garden or yard were blown over into the next parish or field by an unusually heavy gale. In such a case it could not be said that the structure must not be treated as a permanent one because the act of God or some unusual occurrence had for a time removed it from the position which it formerly occupied.

For these reasons I have come to the conclusion that the justices were entitled to come to the decision at which they arrived, and that this appeal fails.

MORRIS J. I am of the same opinion. I agree with my Lord that, in order that the house-boat should be regarded as coming within the word "premises," it should be shown that there was an element of permanency in the site which it occupied.

The case shows that the prosecutor had a right to maintain the boat on the mud in the creek without any precise site being prescribed for it. It further shows that in fact the house-boat does appear to have occupied a particular site. It seems to me that the finding that the house-boat had at all material times lain in a mud berth at Coast Road, West Mersea, shows that it did in fact occupy a particular site. The circumstance that it floated at high tide and at low tide rested on the mud does not, in my judgment, alter the fact that it was in a particular place. It seems to me, therefore, that there was here an element of permanency in the site, and I agree with my Lord, that the occurrence of a gale having an unusual result is quite immaterial for this purpose.

One other matter has influenced my mind: I think that the provision in the Act relating to the laying of a supply pipe

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contemplates that there should be some element of a fixed site—a junction of premises having some degree of permanency with the water mains of the undertakers who are to deliver the water. Speaking for myself, I had some doubt during the argument on this part of the case, but I think that those doubts are resolved by the finding in the case that the provisions of Part X of sch. III to the Act in respect of the laying of a supply pipe have been complied with by the prosecutor. That finding shows that the water suppliers considered that there had been a proper laying of the supply pipe, and to that fact must be added the very significant additional circumstance that between 1944 and February, 1949, the house-boat was rated as premises and a water rate was demanded and paid. That, I think, only adds confirmation to the view that there was a compliance with Part X of sch. III to the Act with regard to the laying of a supply pipe. The very fact that a supply pipe could properly be laid and was adequately laid in my judgment itself denotes that there was a sufficient degree of permanency and a sufficient element of fixity of site for the "premises."

I agree that the appeal should be dismissed.

FINNEMORE J. I also agree. Under the Water Act, 1945, an owner or occupier of premises within the limits of supply of the water undertaking can, on complying with Part X of the Act, demand a water supply for domestic purposes. The words are: "An owner or occupier of any premises within "the limits of supply," and the argument in this case has turned on the meaning of the word "premises." The word "premises," as I understand it, is not a term of art, and it must be considered in each case according to the subject-matter concerned. It is to be noted that there is no definition of the word "premises" in this Act, but that it is stated to include land and, further, that "'land' includes any interest "in land and any easement or right in, to or over land." I think that those words indicate that "premises" in this Act is to be construed in a wide and liberal sense, bearing in mind that the purpose of the Act, among other things, is to ensure a proper supply to people who need water for domestic purposes.

It is not disputed that the prosecutor had carried out her duties under Part X. The only question is whether this particular house-boat was in the circumstances of this case included within the term "premises." Obviously, there have to be rules or tests, and it seems to me that the three which Mr. Hines indicated may be the proper ones: first, the premises must be a place where water for domestic purposes is required. That is not in issue here. Secondly, there must be a reasonable degree of certitude of position. That is obvious for many reasons, among others the practical reason of laying the pipe and supplying the water to a particular place, and also because the Act, as I understand it, does not provide for water to be supplied through a supply pipe to some movable object sometimes present and sometimes not. The justices have found that this house-boat had at all material times lain in this particular mud berth; and that seems to me to be a finding that there was a reasonable certitude of position. What is argued against it is that when the tide was low this boat was lying in the mud, and that when the tide came in it floated. It does not seem to me that that up-and-down movement with the tide is enough to destroy the certitude of position which for practical purposes is necessary.

The third test is whether there is a reasonable degree of permanency. There appears to me to be no right to demand a supply of water through a pipe to a yacht which goes out to sea and from time to time comes up the river and berths at a particular place; but the finding here is that for a number of years this house-boat had been in this position on the mud flat, except only that it rose with the high tide. It seems to me that the finding of the justices that it had lain at this mud berth does indicate that for practical purposes it was permanently moored in a particular place.

Our attention was called to the finding in the case that Wyatt merely permitted the house-boat to remain upon the mud in the creek without prescribing any precise site for it. That may well be, as between the prosecutor and Wyatt; but in fact for a number of years, indeed at all material times, the boat was moored in a particular place. The only exception to that is that on one occasion there was a gale which caused the boat to move some twenty yards along the creek. That is an accident which might happen not only to a boat but in certain circumstances to any kind of property. It does not in my opinion in any way destroy the view that the boat fixed

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in this particular way at this particular place is properly described as "premises." That being so, the people owning or occupying it require water for domestic purposes, and they are entitled to have it supplied. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Adam Burn & Son, for John Fowler, Oldman & Co., Brightlingsea, Essex; Bishop & Son.*

P. B. D.

Affirmed. VITKOVICE, ETC. *v.* KORNER [1951] A. C. 869

Affirmed. H.L. *sub nom.* VITKOVICE HORNI A HUTNI TEZIRSTVO *v.* KORNER. [1951] 2 All E.R. 334.

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Jan. 18, 19, 20, 23:
Feb. 13

Bucknill, Singleton and Denning L.JJ.

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Practice—Service of notice of writ out of jurisdiction—Alleged breach of contract within jurisdiction—Standard of proof as to breach—Whether prima facie proof sufficient—R. S. C., 1883, *Or.* 11, *rr.* 1 (*e*) *and* 4.

On an application under R. S. C., Or. 11, rr. 1 (*e*) and 4, for leave to serve notice of a writ out of the jurisdiction on a defendant (not ordinarily resident in Scotland or Ireland) in respect of a breach, committed within the jurisdiction, of a contract made out of the jurisdiction, there are three issues to be considered by the court: (1.) whether there was a contract; (2.) whether there was a breach of it; and (3.) if so, whether the breach was committed within the jurisdiction. On the first two issues, the plaintiff must make out a prima facie case, and, if that case is based on facts which are put in issue, nevertheless leave should be given. If the court on these two issues sees, on the face of the proceedings, that it is a groundless action, it will not allow an order to go for service out of the jurisdiction; but if the plaintiff has a case which properly can be put before the court of trial and argued, and one in which, if the court of trial finds in accordance with the facts alleged by the plaintiff, the result would probably be judgment for him, leave should be granted.

But on the third issue (whether a breach was committed within the jurisdiction), the standard of proof differs from that applicable to the other two. The plaintiff must satisfy the court, there and then on the application, that there has been a breach within the jurisdiction.

So *held* by Singleton L.J. and Denning L.J., Bucknill L.J. dissenting.

Observations of Lord Goddard C.J. in *Malik* v. *Narodni Banka Ceskoslovenska* (1946) 176 L. T. 136, followed.

Per Bucknill L.J., dissenting. The same standard of proof was all that was required on all three issues. There was no special standard of proof which required that the court must be satisfied, there and then on the application, that there had been a breach of the contract within the jurisdiction. Such a proposition was contrary to the decisions in *Fowler* v. *Barstow* (1881) 20 Ch. D. 240; *Thomas* v. *Hamilton* (*Dowager Duchess*) (1886) 17 Q. B. D. 592; *Badische Anilin und Soda Fabrik* v. *Chemische Fabrik vormals Sandoz* (1903–4) 88 L. T. 490, and 90 L. T. 733; and *Tyne Improvement Commissioners* v. *Armement Anversois S/A* (*The Brabo*) [1949] A. C. 326. If indeed the observations of Lord Goddard C.J. in *Malik's* case (supra) had the meaning attributed to them, that, on this third issue, this standard of proof was necessary, which he (Bucknill L.J.) doubted, the observations were obiter and should not be followed, having regard to the decisions cited.

In April, 1946, the plaintiff brought an action claiming arrears of pension and salary which he said were due to him from the defendants. On the issue in chambers under R. S. C. Or. 11, rr. 1 (*e*) and 4, the plaintiff relied on an oral agreement which he said he had made early in January, 1929, in Czechoslovakia, with the general manager of the Czechoslovakian defendant company, that he should receive payment of his pension from the defendants in the country in which he might be living at the time when it accrued. From 1939 to 1946 the plaintiff was living in London and Scotland and it had not been paid to him there. He stated that he had not remembered the conversation of 1929 at the time when he issued his writ, but that it had been brought to his recollection by a letter written by him, exhibited to an affidavit filed for the defendants—a letter of which he had not kept a copy. The arrangements as to the plaintiff's pension were subsequently reduced into writing and contained in a letter from the defendants to the plaintiff dated January 18, 1929. There was no reference in the letter to payment of the pension to the plaintiff, wherever he might be, but there was a provision that, should the Czech crown be reduced by more than 10 per cent. of its then gold value, the difference in value should be made good to him.

On the facts, Bucknill L.J. found that there was prima facie proof of a breach of contract to pay to the plaintiff his pension in London, and Singleton L.J. (holding that the plaintiff must satisfy the court forthwith that there was a breach of contract within the jurisdiction) found that the court before which the application came should have been so satisfied. Denning L.J. expressed his view to the contrary, thus agreeing on both fact and law with the court before which the application was made. Accordingly, leave was granted to serve notice of the writ out of the jurisdiction.

The plaintiff by his writ also claimed under a service agreement arrears of salary, which were payable in sterling. He alleged that, being payable in sterling, they were payable to him by the defendants in London and had not been so paid. On this issue

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the court ordered that the claim should be limited, so that if it should appear on the trial that this claim was not payable within the jurisdiction, the plaintiff was not to recover judgment on it.

Thomas v. *Hamilton* (*Dowager Duchess*) (1886) 17 Q. B. D. 592, followed.

Decision of Slade J. approved by a majority on law, but overruled by a majority on fact.

APPEAL from Slade J., in chambers.

The plaintiff, who was not a British subject, obtained leave from Master Moseley to serve the defendants, a company incorporated according to the laws of Czechoslovakia, with notice of a writ out of the jurisdiction. The defendants entered a conditional appearance and moved to set aside service of the notice and all subsequent proceedings. Master Grundy granted the application, and, on appeal, his decision was upheld by Slade J. His Lordship said that he was not satisfied that there was an obligation on the defendants to pay to the plaintiff in London either his pension or his salary. Accordingly, although they had made no such payments to him there, there was no breach of contract within the jurisdiction. If he were wrong in this, and he had jurisdiction to order service out of the jurisdiction, the matter was one within his discretion. In any case the forum conveniens was in Czechoslovakia. The plaintiff appealed to the Court of Appeal, contending that the case fell within R. S. C. Or. 11, rr. 1 (*e*) and 4 (1), that the decision of Slade J., was wrong,

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(1) R. S. C., Or. 11, r. 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . . (*e*) the action is one . . . . brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction, of a contract, wherever made . . . ."

Rule 4: "Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place, or country such defendant is or probably may be found and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order."

Article 905 of the Czech Civil Code: "If the place of performance is neither determined, nor can be inferred from the

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and that he ought to be allowed to serve notice of the writ out of the jurisdiction.

By the writ the plaintiff claimed 10,913*l*., said to be due under a pension agreement, and 13,840*l*. as salary under a service agreement. He also claimed damages for breach of contract. His case, put shortly, was that both pension and salary were, in the events which had happened, payable to him by the defendants in London, that their non-payment was a breach of contract, and that the breaches took place within the jurisdiction of the court, namely, in London.

As appeared from the affidavits, the plaintiff had held high office with the defendants, whose undertaking was now nationalized. Early in January, 1929, his pension was discussed by the plaintiff and the defendants, and in a letter which the defendants wrote to him on January 18, 1929, they stated : " The agreements hitherto in force in the event of " your being pensioned are annulled and the following " covenants shall apply in place and stead thereof.

" The pensionable period of 16½ years accrued to you in " your position as principal of the Municipal Commercial

" circumstances or the purpose " of the transaction, the performance has to take place where " the debtor was resident at the " time when the relationship " creating the obligation arose, " or, if the obligation arose in " connexion with an enterprise of " the debtor, at the latter's place " of business. As to measures, " weight and currency the place " of performance is decisive."

" The debtor has, if there " is any doubt in the case of a " money debt, to transmit the " money owed by him at his risk " and cost to the creditor at the " latter's residence (place of business). If a change of residence " (place of business) occurred after " the relationship creating the " obligation has come into " existence, the creditor has to " bear the risk and cost in so far " as they were increased by such " a change."

Article 914 : " In the interpretation of contracts one " should not adhere to the literal " meaning of expressions, but " should examine the intention " of the parties and interpret " the contract in a manner consistent with fair dealing."

Article 1420:: " If the place and " nature of performance have not " been determined, the rules " stated above in Article 905 " shall apply."

Article 1425 : " If a debt " cannot be paid because the " creditor is unknown, absent or " dissatisfied with the offer or for " some other important reason, " the debtor may deposit what " is due in court, or, if what is " due is not suitable to be " deposited in court, he may " apply to the court for an order " as to safe custody. Such acts, " if done in accordance with the " law, shall discharge the debtor " from his liability and transfer " the risk to the creditor."

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" School at Iglay will be calculated in respect of a period of " 10 years in such a manner as though you had been, during " that time, in the service of the ironworks, that is to say, " as ' service years at the works.'

" Accordingly, your claim to a pension lapses in respect " of a period of 6½ years.

" The calculation of your disability pension and/or widow's " pension and the contributions towards the education of your " surviving dependants is effected on the basis of the articles " in force of the Pensions Institute I and Allowances Fund I, " the pensionable aggregate basis being regarded as one-third " of the total drawings (salary, Christmas and balance sheet " remuneration) to which you are entitled for the calendar " year preceding the occurrence of the insured risk, but with " the restriction that :

" (*a*) The aggregate basis for calculation of pension must " not exceed the amount of 200,000 Cz. crowns.

" (*b*) The disability pension, the amount of 120,000 Cz. crowns.

" (*c*) The widow's pension, the amount of 60,000 Cz. crowns.

" (*d*) The contribution to the education for each semi-" orphaned child the amount of 12,000 Cz. crowns ; and

" (*e*) The contribution to the education of each completely " orphaned child, the amount of 24,000 Cz. crowns per annum.

" Should the Cz. crown be reduced by more than 10 per cent. " of its present gold value, the difference in value will be " made good to you and/or your survivors in each particular " case."

To one of the defendants' affidavits was exhibited a letter of November 23, 1938, written by the plaintiff in the course of a dispute as to the correct manner of calculating his pension, containing these words : " The gold clause was requested " with the express argumentation that I am going to overseas " and that the matter was for me to receive the full gold value " in case that nominal value of the Kc. stated by law deviate " from the effective rate of exchange as per international rate " of exchange." The plaintiff swore that he had not kept a copy of this letter, but that, when he saw it, here collected details of a conversation which he had had with Dr. Sonnenschein the defendants' general manager, early in January, 1929, and of the agreement at which they arrived, which resulted in the letter of January 18, 1929. He said that he had stated that he intended to enjoy his pension abroad, although he did not then know in which country. And he said that Dr. Sonnenschein expressly agreed, acting for the defendants, that he should receive payment of his pension in the country in which he might be living at the time when it accrued due. It was for this reason that, at his request, the clause providing for the full gold value of the Cz. crown was inserted in the letter of January 18, 1929. The plaintiff stated that he had not recollected that conversation when the writ was issued, and Dr. Sonnerschein was now dead. The plaintiff also said that his pension account was headed by the words: " Ausl. Kc." which meant " foreign Czech crowns," and he stated that it was in accordance with the universal practice in that country to use those words to indicate accounts payment of which was to be made abroad.

As to the service agreement, the plaintiff said that in 1938 he informed Dr. Fuchs for the defendants that he intended to retire to America. After discussion the plaintiff agreed that he would remain in Europe, residing in Zurich, Paris or London. The plaintiff was to be consultant in the defendants' reorganization and was to be available for a period of thirty days during each year at a fee of 2,000*l.* sterling a year. A letter dated March 25, 1938, was written to him by the defendants, as follows:—

" We appoint you as from May 1, 1938, as consultant in " the reorganization now being undertaken of the works " accountancy and works costing system, and at the same time " as financial and tax consultant for our works and those of " our combined undertakings. In that capacity you will " work under the managing director, and will be required to " carry out your duties in accordance with his instructions.

" You are obliged during each year, to be at the disposal " of the works or its combine undertakings for a period of " 30 days. The said period of 30 days shall not include any " conferences with the responsible officials of our works book- " keeping, works costing and works control department sent " to your particular residence.

" For your activities we pay you an annual fee amounting " to 2,000*l.*—two thousand pounds sterling—which amount " shall be payable in quarterly instalments, in advance.

" In the event of your being required to travel on our " instructions we pay your travelling expenses and allowances " to the extent allowed to our directors.

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"This agreement is entered into irrevocably for both parties "from May 1, 1938, until the end of 1940. If by June 30, "1940, we have not given notice to terminate the agreement "with valid effect at the end of 1940, it will be prolonged after "December 31, 1940, from year to year, unless notice is given "to terminate it six months prior to the end of any particular "year by one of the contracting parties."

On his retirement in March, 1938, the plaintiff said that he became entitled to a pension of 120,000 Cz. crowns (increased to 178,408 through the fall in value of the Cz. crown), and that, as from May 1, 1938, he was entitled to the salary of 2,000*l.* as consultant. On his retirement, he went to Zurich for a time and then came to England, where he bought a house at Hampstead at which he lived. After the outbreak of war he acquired an estate in Scotland for his family and took a flat in London for himself, the house at Hampstead having been requisitioned.

From 1938, until 1940 or later, the plaintiff owed money to the defendants in Czechoslovakia which he had borrowed from the defendants for the purchase there of a house. Payments under the pensions agreement were credited to this loan account and also, according to the defendants, during 1938 under the service agreement. Remittances, however, were made at the instance of the plaintiff to relatives of the plaintiff in Czechoslovakia and abroad. The defendants, war having broken out in 1939, stopped payment of the salary under the service agreement. The plaintiff said that his indebtedness to the defendants was thus reduced and extinguished in about the year 1940. This was not agreed to by the defendants. The plaintiff said that he himself had not received in London, or in person, any payments under either agreement since he left Czechoslovakia in 1938. The plaintiff's address in London was known to the defendants.

Slade J., held that in the case of both agreements the plaintiff had established a prima facie case (1.) that there was a contract at the date of the issue of the writ, and also (2.) that there had been breaches of each of those contracts. Those were matters which had to be decided at the trial. The sole issue which remained for him was whether the breaches were committed within the jurisdiction. On this issue he thought, following the observations of Lord

Goddard C.J., in *Malik* v. *Narodni Banka Ceskoslovenska* (1), that the standard of proof was different. He must be satisfied that the breach occurred within the jurisdiction before he could grant leave for notice of the writ to be served out of the jurisdiction. The plaintiff must prove this on the application. This was his conclusion of law. His conclusion of fact was that he was not so satisfied, and he refused the plaintiff leave to serve the defendants out of the jurisdiction.

The plaintiff appealed.

Sir Andrew Clark K.C., *F. Gahan* and *De Piro* for the plaintiff. The decision of Slade J., was wrong. Following the observations of Lord Goddard C.J., in *Malik* v. *Narodni Banka Ceskoslovenska* (1), which were obiter, he held that, though the plaintiff need only produce prima facie proof that (1.) he had a contract with the defendants and (2.) that this contract had been broken, on the third issue, that the breach took place within the jurisdiction, that is, that the plaintiff's pension and salary were payable in London and that they were not paid to him in London, the court must be satisfied, there and then, that this was so. In other words, this issue must be determined once and for all before the master, subject to appeal, and not at the trial of the action, before he could grant leave to serve notice of the writ out of the jurisdiction. This is not so and there is no trace of this proposition in the authorities before 1946. The standard of proof is the same in the case of each proposition: the plaintiff must show that he had a prima facie case on each of the three issues. He must show that he has grounds for his action. But though the facts on which he relies may be put in issue, if he can show a prima facie case on each issue that will justify an order for service of the writ out of the jurisdiction. There is no ground in the words of rr. 1 (*e*) and 4 of R. S. C. Or. 11 for making any distinction between the standard of proof required on the three issues. And there is no reason for the trial of the case on this preliminary application: see *Fowler* v. *Barstow* (2); *Thomas* v. *Hamilton* (*Dowager Duchess*) (3); *Badische Anilin und Soda Fabrik* v. *Chemische Fabrik vormals Sandoz* (4); *Hemelryck* v. *William Lyall Shipbuilding Co. Ld.* (5); *Atkins*

(1) (1946) 176 L. T. 136; [1946] 2 All E. R. 663.

(2) (1881) 20 Ch. D. 240.

(3) (1886) 17 Q. B. D. 592.

(4) (1903-4) 88 L. T. 490; 90 L. T. 733.

(5) [1921] 1 A. C. 698.

v. *Thompson* (1); and *Tyne Improvement Commissioners* v. *Armement Anversois S/A* (*The Brabo*) (2).

The observations of Lord Goddard C.J., in *Malik's* case (3) were obiter, since it is clear that the payment to the plaintiff in that case was to be made in Czechoslovakia. Here, there was an express stipulation as to the place of payment of the pension made by Dr. Sonnenschein in January, 1929, viz. that the pension should be paid as it accrued to the plaintiff wherever he might be. This was part of the contract, since the letter of January 18, 1929, was not the contract, but only evidence of the contract. But if that were not so and, as in the case of the service agreement, if the implication is, in the circumstances, that the payment should be made wherever the plaintiff was, and he was in London, that would be sufficient to justify service of the notice of the writ out of the jurisdiction: see *Rein* v. *Stein* (4) and *Charles Duval & Co. Ld.* v. *Gans and Another* (5). [*Comber* v. *Leyland and Bullins* (6) was also referred to]. The circumstances here which show that the payments were to be made to the plaintiff in London, after the debit account in Czechoslovakia was discharged, in 1940 according to the plaintiff and in 1942 according to the defendants, were: the provision in the letter of January 18, 1929, that if the value of the Czech crown were reduced by more than 10 per cent the difference should be made good to the plaintiff in his pension payments and the fact that his pension account was headed by the words: " Ausl. Kc." By English law the payments should have been made to the plaintiff in London. That also was the effect of Czechoslovakian law: see article 905 of that country's Civil Code, and the affidavits of Dr. Bobasch.

War did not abrogate or discharge the plaintiff's accrued right to salary to be paid by the defendants: the right to recover it was merely suspended: *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag* (7).

As to the forum conveniens, it is clear that it is in England, not in Czechoslovakia: see *Oppenheimer* v. *Louis Rosenthal & Co. A/G.* (8).

(1) [1922] 2 I. R. 102.
(2) [1949] A. C. 326.
(3) 176 L. T. 136; [1946] 2 All E. R. 663.
(4) [1892] 1 Q. B. 753.
(5) [1904] 2 K. B. 685.
(6) [1898] A. C. 524.
(7) [1946] A. C. 219.
(8) [1937] 1 All E. R. 23.

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Counsel then addressed the court on the facts and on the interpretation of the contract according to Czechoslovakian law, to show that it was agreed between the parties that the payments under the pension agreement after 1940 (up to which time there was an alternative mode of payment by crediting payments as they became due against the loan account) were to be made to the plaintiff in London, where he was, as they became due, as also were the payments in sterling under the salary agreement.

Clive Burt for the defendants. In the case of *The Hagen* (1), Farwell L. J., citing Pearson J. in *Société Générale de Paris* v. *Dreyfus Brothers*, (2) said that on such an application under Or. 11, r. 1 (*g*), it was always a very serious question " whether " this court ought to put a foreigner, who owns no allegiance " here, to the inconvenience and annoyance of being brought " to contest his rights in this country, and I for one say, most " distinctly that I think this court ought to be exceedingly " careful before it allows a writ to be served out of the juris- " diction." He also said that the court considered that it was established by the cases that, if on the construction of any of the sub-heads of Or. 11 there was any doubt, it ought to be resolved in favour of the foreigner. These observations were obiter, but they were approved by Lord Porter in *Tyne Improvement Commissioners* v. *Armement Anversois S/A* (*The Brabo*) (3). Lord Porter in that case was considering whether the person out of the jurisdiction was a necessary and proper party " to an action properly brought " against some other person duly served within the jurisdiction under r. 1 (*g*) of Or. 11. And it was with regard to the question whether the action was properly brought that he used the words " though leave " should be given when a substantial question of fact is in " issue."

Lord Porter's words, it is submitted, are given too wide an extension in the last passage of the head-note of that case in the Law Reports. Lord Porter was dealing with the question whether the action was properly brought within this country and not with the last words of r. 4 of Or. 11.

[BUCKNILL L.J. Have you considered the judgment of Lush L. J., in *Fowler* v. *Barstow* (4) ?]

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(1) [1908] P. 189, 201.
(2) (1885) 29 Ch. D. 239, 242.
(3) [1949] A. C. 326, 338.
(4) 20 Ch. D. 240, 248

That case was decided before these words in r. 4 were inserted in the Order in 1883. These words shifted the onus of proof: see Statutory Rules and Orders, vol. 7, at pp. 7 and 20.

[DENNING L.J. But see *Société Générale de Paris* v. *Dreyfus Brothers* (1). That case was heard after the introduction of r. 4. The plaintiff must show to the satisfaction of the court that he has a probable cause of action.]

[*Bloomfield* v. *Sereny'i* (2) and *Johnson* v. *Taylor Bros. & Co. Ld.* (3) were also mentioned.] In *Bell & Co.* v. *Antwerp, London and Brazil Line* (4), Lord Esher M.R., speaking on the terms of r. 1 (*e*) said: "the words are not 'which "'according to the "course of business" or the "surrounding "'"circumstances" ought to be performed within the "'jurisdiction,' but, which "according to the terms thereof," "'ought to be performed within the jurisdiction.' No court "has a right to break from the words and make another rule "for itself. Unless the court can see that by the terms of "the contract it is to be performed within the jurisdiction, "it is not entitled to make the order for service abroad." The plaintiff has to prove an obligation by the defendants not only to pay in London, but to pay in London and nowhere else. To allow service under r. 1 (*e*) the terms of the contract must be performed within the jurisdiction. Leave cannot be given in a case where the contract may be performed either within or without the jurisdiction: see *Comber* v. *Leyland and Bullins* (5). As Lord Halsbury L.C. said in that case (6): "One can see exactly what was meant by that"; —the terms of r. 1 (*e*)—"that where the parties have agreed that something "is to be done in this country, some part of the subject matter "of the contract is to be executed within this country, it is "a sort of consent of the parties that wherever they may be "living or wherever the contract may have been made, that "question may be litigated in this country." [*Rein* v. *Stein* (7) and *Charles Duval & Co. Ld.* v. *Gans & Another* (8) again referred to.]

Even if one were to accept the plaintiff's account of a conversation between Dr. Sonnenschein and himself which took place more than 20 years ago, and which the plaintiff did not

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(1) (1887) 37 Ch. D. 215.

(2) (1945) 173 L. T. 391; [1945] 2 All E. R. 646.

(3) [1920] A. C. 144.

(4) [1891] 1 Q. B. 103, 107.

(5) [1898] A. C. 524.

(6) Ibid, 527.

(7) [1892] 1 Q. B. 753.

(8) [1904] 2 K. B. 685.

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recollect at the time when he issued his writ, the effect of that conversation was not inserted in the written contract made between the parties which is contained in the letter of January 18, 1929. Further, that conversation does not purport to establish that the obligation was to pay only in England. Slade J., was right in holding that he was not satisfied on the evidence before him that there was a contractual obligation to pay the plaintiff under either agreement only in England. The observations of Lord Goddard C.J., in *Malik* v. *Narodni Banka Ceskoslovenska* (1) formed part of the ratio decidendi of that case, since they formed part of the test applied there: they were not mere obiter dicta, and this court will follow its own decision in that case.

The standard of proof differs in the case of proof of the third issue: that there was a breach of the contract within the jurisdiction. On this issue the tribunal before which the application comes must be satisfied at the time of the application, or it cannot order service of the notice of the writ out of the jurisdiction.

The Czechoslovakian State is recognized by our State. The forum conveniens was not in this country: see *Luther* v. *Sagor* (2).

Counsel also addressed the court on the facts and on the interpretation of the contracts according to Czechoslovakian law.

Sir Andrew Clark K.C., replied.

Cur. adv. vult.

Feb. 13. The following judgments were read:

BUCKNILL L.J. I have had the opportunity of reading the judgments (to be delivered) of Singleton L.J. and Denning L.J. I adopt the statement of the material facts as set out in the judgment of Singleton L.J. As Slade J. said in his judgment, the crucial questions for determination in the case of each of the two contracts are: (1.) was there a contract at the date of the issue of the writ? (2.) was there a breach of that contract? (3.) if there was a breach of that contract, was the breach committed within the jurisdiction of the English courts?

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(1) 176 L. T. 136; [1946] 2 All E. R. 663.

(2) [1921] 3 K. B. 532.

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In the case of the pension agreement the judge said that that agreement was operative at the date of the issue of the writ, and continued : " Was there a breach of it ? Again " I apply the prima facie standard, and I answer that question " in the affirmative, because on the evidence I think there is " certainly a prima facie case that no payment under it has " ever been made ; certainly not all the payments under it " have been made." I think, therefore, that the sole question as regards the pension agreement is whether the breach was committed within this jurisdiction. On this point I think that our decision should turn on the weight which we attach to the allegation of the plaintiff in para. 3 of the affidavit sworn by him on June 9, 1948 : " When I negotiated the " pension agreement of January 18, 1929, with the defendants, " I stated that I intended to enjoy my pension abroad, although " I did not then know in which country, and it was expressly " agreed by Dr. Sonnenschein, who was the general manager " of the defendants, and who was acting on their behalf, " that I should receive payment of my pension in the country " in which I might be living at the time it accrued." Slade J., when referring to this allegation, said : " That sets out an " alleged express agreement by Dr. Sonnenschein that there " should be a contractual obligation upon the part of the " defendants to make payment in the country in which the " plaintiff might be living at the time it accrued." If, therefore, that allegation is established, the breach within the jurisdiction is also established. In these circumstances what ought the court to do where such an allegation is made ? I think that the allegation is not on the face of it unreasonable, for the reasons given by Singleton L.J. in his judgment. Slade J. does not in his judgment say that he rejected this statement by the plaintiff as untrue or unreasonable. He dealt with the point in these words : " I have to ask myself " whether I am satisfied, and again I say I am not satisfied, " that there was any express term of the agreement or any " manifestation of intention which ought, according to Czech " law, to be treated as though it were part of the agreement, " and still less am I satisfied that, if there were any such " manifestation of intention, it was a contractual obligation " to pay and to pay only in this country."

Having regard to the judge's interpretation of the allegation by the plaintiff to which I have already referred, I read the first part of this statement as meaning that the judge is not

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satisfied that the allegations by the plaintiff are true. The judge does not give any reasons why he is not satisfied, but the reasons may be inferred from his statement in the paragraph immediately preceding the passage which I have quoted, in which he says that he is not satisfied. The judge there said: "The defendant's answer to that (namely, the plaintiff's "allegation of an express agreement) is: Dr. Sonnenschein "has been dead a long while and it is very convenient "for Mr. Korner, who made no reference to that in his "first affidavit when he finds himself in difficulty, to "come along with an express oral agreement attributed to "this gentleman who is long since deceased. That is the way "they put it." I think that the judge considered that it was his duty to take such matters as those put forward by the defendants by way of criticism of the veracity of the plaintiff when deciding whether he was satisfied that a breach of contract had been committed within the jurisdiction; and if he decided that there was weight in them he was entitled to say that he was not satisfied, and on that ground refuse to give leave to issue the writ. The crucial question, as I see it, is whether the judge, in exercising his discretion, applied a wrong principle as regards standard of proof.

It is clear from the judgment that the judge drew a distinction between on the one hand the standard of proof required of the plaintiff as regards the formation of the contract with the defendant which is sued upon, and its breach, and on the other hand the proof required to establish that the breach was committed within the jurisdiction. On this point Slade J., said: "I emphasize that all that is required "in the first part of Or. 11, r. 4, is that the deponent shall depose "to his belief that the plaintiff has a good cause of action. "What is involved in a good cause of action in an action in "contract? Two things, and two things only: (1.) that "there should be a contract between the parties, and (2.) that "there should be a breach of that contract. Those two "matters are, of course, if they are disputed in the pleadings, "matters which will have to be decided at the trial, wherever "the trial takes place. But where the contract is not one "made within the jurisdiction, even though there be a contract "and a breach, the case does not fall within the terms of "Or. 11, r. 1, unless the breach relied upon is a breach, within "the jurisdiction, of a contract which ought to have been

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"performed within the jurisdiction. I therefore have to ask "myself at the outset the question as to the standard of proof "which I ought to apply in considering the evidence before me "as to whether the contract is one which ought to be performed "within the jurisdiction, and whether the alleged breach of that "contract was or was not a breach within the jurisdiction." He quoted the concluding words of Or. 11, r. 4: "No such leave "shall be granted unless it shall be made sufficiently to appear "to the court or judge that the case is a proper one for service "out of the jurisdiction under this order," and decided that they required him to be satisfied that there was a breach within the jurisdiction. Again, he said: "To make it "quite clear, I apply the prima facie case test to the alleged "contract and the alleged breach. I apply the test that "I must be satisfied as to the place where the breach occurred."

Unless there is authority which this court ought to follow for this conclusion of the judge, I think that it is erroneous. On principle, I do not see why there should be a standard of proof on the issue whether the act or omission on which the jurisdiction is alleged to be based occurred within the jurisdiction, different from the standard of proof required of the act or omission of the defendant which is alleged to give rise to his liability to the plaintiff. It may well be that the same set of facts will be relied on, both to found liability and to found jurisdiction. I do not see why there should be a different standard of proof required for each allegation. The Judicature Act, 1875, contains in its First Schedule the Rules of Court. Order 11 then had no r. 4, and r. 3 (now in effect, the first part of r. 4) did not contain the words relied on by Slade J. Rule 4, in its present form, came into existence when the Rules of the Supreme Court, as revised, came into operation on October 24, 1883: see Statutory Rules and Orders, vol. 7, p. 7.

No reason for the addition of these words appears in any reported case, so far as I know, but the facts in *Fowler* v. *Barstow* (1), show that some such words were needed, because it was doubtful what course the court should adopt in cases where there was merely an affidavit stating that in the belief of the plaintiff he had a good cause of action. The point was decided in *Fowler* v. *Barstow* (1). The plaintiff Fowler sued the defendant Barstow, who resided in Edinburgh, to recover a sum of money which Fowler had paid to Barstow and to two other persons, Larchin and Lynch, for an interest in a colliery. Fowler founded his claim upon alleged misrepresentations made by the defendant as to the value of the colliery and the sum which it had cost them. On an ex parte application, the vacation judge gave Fowler leave to serve the defendant in Scotland, and in support of his application Fowler swore an affidavit that he was induced to buy this interest by the misrepresentations of Barstow and Lynch and Larchin, and that the whole of the negotiations which resulted in his paying the purchase price took place in the City of London. Barstow then entered a conditional appearance and moved the court to discharge the order. In support of his application he filed an affidavit denying all the allegations of the plaintiff, and also stating that he was not in London in the latter part of 1875, and never saw Fowler in his life till February, 1876. Fowler filed an affidavit in reply, in which he said that the representations were made to him by Larchin and Lynch, adding: "I was further "informed by them, who I claim were the agents of the "defendant, Barstow, in the representations they made to "me, that they were in communication with Barstow as to "the terms upon which I should be sold an interest in the "colliery."

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(1) 20 Ch. D. 240.

Chitty J., did not allow Barstow's affidavit, or Fowler's affidavit in reply, to be read, and refused the application to discharge the order for service. On appeal, the Court of Appeal held that the affidavits of Barstow, and of Fowler in reply, might be put in, and allowed the appeal. Jessel M.R., in the course of his judgment said (1): "On the "main point as to whether or not there was a cause of action "within the jurisdiction, I am in favour of the appellant" "(defendant). "On the first affidavit I agree that if the plaintiff "had not retired from it there would have been a case. But "it appears to me plain upon reading all these affidavits that "the statement made by the plaintiff in his first affidavit "is now admitted by him to be incorrect, and there is no "longer any allegation whatever by anybody that the "defendant, Barstow, made any representation within the "jurisdiction."

Baggallay L.J., in the course of his judgment said (2): "As I am at present advised, ... I think that the "original affidavit filed by the plaintiff was sufficient to

(1) 20 Ch. D. 246.

(2) Ibid. 247.

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"obtain leave to serve out of the jurisdiction . . . . But "then the defendant puts in an affidavit in which he makes "a statement which, if true, shows that there was no jurisdiction whatever to make an order, because, he says, he "never made any misrepresentation at all . . . . Now "I quite think that upon an application to discharge such an "order as was made in this case, an affidavit may be made "for the purpose of showing that the court had no jurisdiction "to make an order." Lush L.J., said in the course of his judgment (1): "The defendant is allowed to show that no "cause of action did accrue within the jurisdiction. That is "what the defendant proposes to do here, and that has been "the established practice." After dealing with the allegations in the affidavits, Lush L.J., continued (1): "It therefore "stands admitted on the affidavit in reply that the defendant "did not make a representation to the plaintiff, that he did "not make it by letter and that he did not make it by agency "at all. The defendant has clearly shown, to my mind, that "a cause of action, as far as he is concerned, did not occur "within the jurisdiction. That is the question we have to "decide and upon that I entertain no doubt."

Apart from some remarks of Lord Goddard C.J., in his judgment in *Malik* v. *Narodni Banka Ceskoslovenska*, (2) there was not brought to our notice any reported case, during the sixty-six years that have passed since Or. 11, r. 4, appeared in its present form, to suggest that there was such a different standard of proof as Slade J., has required. In every case to which we were referred, the concluding words of Or. 11, r. 4, appear to have been treated as of general application when the court considered whether the case was one in which leave to serve out of the jurisdiction should be given. The proper interpretation of r. 4, of Or. 11, was considered by the Court of Appeal in *Thomas* v. *Hamilton* (*Dowager Duchess*) (3).

In that case Field J., in chambers, had given the plaintiff leave to serve a writ on the defendant, who was a foreigner residing out of the jurisdiction, in respect of the price of goods supplied. The defendant duly applied to Day J., in chambers, to vary the order of Field J., and to set aside the subsequent proceedings thereon. The matter in dispute upon the affidavits was whether the price for the goods was by the terms of the sale

(1) 20 Ch. D. 250.

(2) 176 L. T. 136; [1946] 2 All E. R. 663.

(3) 17 Q. B. D. 592.

made payable in this country or abroad. Day J., refused to set aside the service of the writ, but ordered that the plaintiff's claim in the action should be limited to the recovery of the price of goods in respect of which it must appear at the trial that a writ could have been properly served out of the jurisdiction.

On appeal to the Divisional Court, composed of Field J. and Butt J., the plaintiff argued that Day J., ought not to have imposed this limitation on the claim. In his judgment, Field J., said that on the affidavits before him he was satisfied that the breach of contract was within the jurisdiction, as required by the rule, and consequently he made the order. The defendant subsequently applied on affidavit to set aside the order. It was competent for the judge to set it aside if not satisfied that the breach of contract arose within the jurisdiction. He did not take that course, but, not being altogether satisfied whether the breach arose within the jurisdiction or not, he imposed the limitation on the claim. Field J., decided that in general it was not right as a matter of principle to impose such a limitation, because it postponed until the trial a preliminary question of procedure which ought properly to be determined at the outset of the litigation. He was therefore in favour of allowing the appeal.

The appeal was allowed, but in the Court of Appeal the decision of the Divisional Court was reversed. Lord Esher M.R., said that in such a case the judge was not bound to make the order for service out of the jurisdiction. He had a discretion whether in all the circumstances he would do so. Orders similar to that in question here have only been made where the judge is left in doubt. Lord Esher M.R., concluded his judgment by saying (1): " I think that Day J., was right " in entertaining doubt whether on the affidavits any breach " of the contract was shown to have taken place in England, " and having that doubt I think that it was competent to him " to make the order he did make, and that it should be restored."

Bowen L.J., said that he thought Day J., justified in entertaining great doubt whether any breach of the contract was shown to have occurred in England, and, after reading the affidavits and hearing the arguments, he entertained the same doubt himself. He went on to say that it was a matter for the discretion of the judge whether he should allow service

(1) 17 Q. B. D., 596.

out of the jurisdiction, and that what Day J., had done was a very natural and simple mode of exercising the discretion. Fry L.J., agreed. If this decision of the Court of Appeal still stands, it seems to me that it shows clearly that Slade J., was not bound to refuse leave unless he was satisfied (and that he was in error, when he said that he must be satisfied), that there was an obligation to pay only within the jurisdiction before he could give leave for the writ to issue.

The interpretation of r. 4 of Or. 11 was also considered in 1902 in *Badische Anilin und Soda Fabrik* v. *Chemische Fabrik vormals Sandoz* (1). The plaintiffs, a German company, owned letters patent for the United Kingdom relating to the manufacture of aniline dyes. The defendants were manufacturers of aniline dyes at Basle, in Switzerland, and had agents permanently resident in England. The plaintiffs asserted that the defendants in selling some of their aniline dyes in England had infringed the patent rights of the plaintiffs. The plaintiffs obtained an order giving leave to serve on the defendants notice of a writ to restrain them from this infringement. The defendants then applied to the court to discharge the order on the ground that they had not infringed the plaintiff's patent by sales of their dyes in England.

Joyce J., refused to discharge the order, and his decision was affirmed in the Court of Appeal and in the House of Lords. Collins M.R., in his judgment, said (2): "It "does not appear to me that in conferring this jurisdiction "—which I agree is an important one and one to be carefully "exercised—the legislature has imposed on the courts the "duty of trying the case before they allow the plaintiff to put "it in suit. That would be going much too far in favour of "persons outside the jurisdiction. The legislature has thought "fit to allow persons outside the jurisdiction to be brought "into it under certain conditions. It has fenced them round "with a good many conditions which have to be fulfilled in "order to allow them to be brought within the jurisdiction. "But if prima facie evidence by persons against whom nothing "can be urged touching their veracity of information and "belief is brought to show that these conditions have been "fulfilled, and that there has been that special breach within "the jurisdiction which lets in the jurisdiction of the court

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(1) 88 L. T. 490; 90 L. T. 733.

(2) 88 L. T. 490, 494.

"over foreigners, then it seems to me that the court is not "called upon there and then to try that case. It has the "right to, and it is necessary that it should see what the other "side have got to say about the matter. But when that has "been said and there is an apparent conflict of fact raised, "it seems to me that it is not the function of the court there "and then to decide upon the issue of fact. If the court has "got before it a prima facie case which is not completely dis"placed by the evidence on the other side, then it seems to me "that the plaintiff has not lost his right to have that case tried."

In the House of Lords, Lord Davey, in the course of his speech, said (1) "Rule 4 of the same Order 11 prescribes that "the application is to be supported by evidence stating that in "the belief of the deponent the plaintiff has a good cause of "action, and no such leave is to be granted unless it be made "sufficiently to appear to the court or judge that the case "is a proper one for service out of the jurisdiction under this "order. This does not of course mean that a mere statement "by any deponent who is put forward to make the affidavit "that he believes that there is a good cause of action is "sufficient. On the other hand, the court is not on an "application for leave to serve out of the jurisdiction . . . . "called upon to try the action or express a premature opinion "on its merits . . . . The words at the end of the order do "not, I think, mean more than that the court is to be satisfied "that the case comes within the class of cases in which service "abroad may be made under the first rule of the order."

There is nothing in these general statements of principle to indicate that the words at the end of r. 4 should have a different interpretation when applied to the question whether the wrong complained of has been committed, from the interpretation to be given to them when the question is whether the wrong has been committed within the jurisdiction. It may be said that in that case the question was whether any infringement of the patent had taken place, as to which prima facie proof is sufficient, and that the court did not deal with the point that it must be satisfied that the infringement took place within the jurisdiction, because that point was not in dispute. But it seems strange to me that no such suggestion as mentioned in any of the judgments, if in fact such a difference in the standard of proof was there recognized.

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(1) 90 L. T. 733, 735.

In the most recent case in the House of Lords, *Tyne Improvement Commissioners* v. *Armement Anversois S/A* (*The Brabo*) (1), the question which the court had to consider was whether an action had been properly brought against a party within the jurisdiction. It will be noted that the words "properly brought" bear a marked similarity to the words at the end of r. 4—"the case is a proper one for service "out of the jurisdiction." The House of Lords decided that the action was not properly brought because there was no dispute about the facts, and, on those facts, the law was clear that the defendants sued within the jurisdiction were not liable. It is clear from the speech of Lord Porter that if the alleged liability of the defendants within the jurisdiction had depended on disputed facts, he would have regarded it as an action properly brought within r. 1 of Order 11. If, then, an action may be properly brought although the material facts are in dispute, I do not see why the case should not be a proper one for service out of the jurisdiction if there is a prima facie case made out by the plaintiff that the admitted breach of contract is a breach of a term which ought to have been performed within the jurisdiction, although the truth of the facts alleged by the plaintiff is disputed.

On the principle adopted by Slade J., an odd legal position would have arisen in the case of the *Tyne Improvement Commissioners* (1) if it had appeared from the affidavits that there was a serious issue of fact whether the defendants sued within the jurisdiction were liable or not. The judge would then presumably have been faced with this position. "I think "the case is properly brought against the defendants here, "although the material facts are in dispute, but, on the other "hand, I am not satisfied that the case is a proper one for "service out of the jurisdiction because the same material "facts on which the defendants within the jurisdiction are "being sued are in dispute." Although r. 4 was discussed during the course of the argument in that case before the House of Lords, and is the basis of the speech of Lord MacDermott, it nowhere appears in any of the speeches that r. 4 raised a different standard of proof as regards jurisdiction such as Slade J. has accepted in this case.

I must now consider the case of *Malik* v. *Narodni Banka Ceskoslovenska* (1). The facts in that case were somewhat

(1) [1949] A. C. 326.

(2) 176 L. T. 136; [1946] 2 All E. R. 663.

similar to the facts in the present case. Malik, a Czechoslovak subject, came to England, and then sought leave to issue a writ claiming damages for breach of contract against the defendant Bank in Czechoslovakia to pay him his salary in England. But there was one vital difference between *Malik's* case (1) and the present case: in *Malik's* case (1) there was no allegation of any contract made between the plaintiff and the defendants that the defendants should pay the sums claimed under the contract to the plaintiff in England. This is clear from the judgment of Lord Goddard C.J., when he said that there was no vestige of a case for saying that there was any trace of a contract by the defendants to pay the plaintiff his salary in London, and, in those circumstances, the failure to pay him in London was no breach of the contract sued upon. Morton L.J., in his judgment said that he agreed that the notice of writ should not issue, because it was not shown that a breach of contract had been committed within the jurisdiction. Tucker L.J., said that it was clear that under the subsisting contract the obligation was to pay the plaintiff in the currency of his own country, and that payment was to be made there. He said (2): " The original contract remains " the operative contract, and under it it is clear that payment " had to be made in Czechoslovakia." It is clear, therefore, that, whatever the standard of proof required by the law that a breach of contract had been committed to pay in England, the proof failed for the simple reason that there was no proof at all.

Lord Goddard C.J. in the course of his judgment made some remarks on the standard of proof required in cases such as this which were adopted by Slade J. in his judgment. He said (3): " I cannot accede to the argument . . . . that " the question whether there is a breach, and the question " whether it is committed within the jurisdiction, stand on " exactly the same footing. The court in these cases must " approach the matter on the footing of the assumption that " there has been a breach, and then they have to consider " whether or not the breach has been committed within the " jurisdiction, because it is only if the breach has been " committed within the jurisdiction that this court can allow " the writ to be served out of the jurisdiction."

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(1) 176 L. T. 136; [1946] 2 All E. R. 663.

(2) Ibid. 140; 667.

(3) Ibid. 137; 664.

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After referring to *Hemelryck* v. *William Lyall Shipbuilding Co. Ld.* (1), Lord Goddard continued: "No doubt, when "the court is considering whether it will give leave to serve "notice of the writ out of the jurisdiction, the court wants to "see that there is at least an arguable case. If it can see, "by what appears on the affidavits, that the case put up is "a groundless or frivolous one, the court can refuse to give "leave because it can say: Whether you allege a breach "within the jurisdiction or not, you are putting up a case "which on the face of it is groundless, and we are not going "to allow notice of a writ to be served, wherever the breach "took place. On the other hand, the court, having looked "at the affidavits, could say that there were disclosed on the "affidavits facts which, if they were proved at the trial, "would show that there had been a contract and breach of the "contract. The action has to be in respect of the breach of "the contract. The court on this application is not going to "inquire whether the case is one in which the plaintiff must "necessarily succeed, but if they see on the face of the proceedings that it is a groundless action, no doubt they will "not allow an order to go for service out of the jurisdiction. "As a general rule the court will approach the case on the "footing that the plaintiff has got a case which can be properly "put before the court and argued, and one in which, if the "court finds in accordance with the facts alleged by him "the result would probably be judgment for him. When, "however, it comes to the question whether a breach has been "committed within the jurisdiction, that is another and very "different proposition. We have been reminded . . . . that "r. 4 of Order 11 expressly says that 'No such leave shall be "'granted unless it shall be made sufficiently to appear "'to the court or judge that the case is a proper one for "'service out of the jurisdiction under this order.' "Therefore, the court has to be satisfied on the affidavits "that the action is brought in respect of a breach within "the jurisdiction."

If these remarks of Lord Goddard C.J., have the meaning attributed to them by Slade J., which I doubt, I think they were obiter in that they were not necessary for the decision of the court. As I have already said, however low the standard of proof required, the plaintiff failed to reach it, because he produced no evidence at all of a contract to pay him in England. If they were not obiter, I think that they lay down a rule of construction of r. 4 of Order 11 which is inconsistent with the decisions to which I have referred. I therefore do not think that this court is bound to accept the view put forward by Slade J. that there is a special standard of proof required which must satisfy him that there has been a breach of contract within the jurisdiction before he will allow service of the writ outside the jurisdiction. Where the facts are disputed or open to criticism, it seems to me that such satisfaction can only be reached by trial and determination of those facts. I think that the concluding words of r. 4, applicable as they are to all the instances of r. 1, only require that in each case, and on every material part of it, the court must not act merely on vague statements such as statements based on information and belief, or on statements which are obviously untrue, or, as contended in the *Tyne Commissioners* case (1), on statements that the law as to the liability of the party sued here is difficult and complicated and that the matter had better be left to be decided by the trial judge. Having regard to the general principles laid down in *The Hagen* (2), that will not suffice. In each case the plaintiff must, as I think, make out a prima facie case, and if that case is based on facts which are put in issue, nevertheless leave should be given.

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(1) [1921] 1 A. C. 698.

For these reasons, I think that Slade J., was wrong in refusing leave on the ground that he was not satisfied that there was any express term of the agreement about payment of the pension in London, and that he misdirected himself in the exercise of the discretion vested in him. I also think that the judge was wrong when he said: "Still less am I satisfied that, if "there were any such manifestation of intention, it was a "contractual obligation to pay and to pay only in this country." The oral contract, as alleged in the plaintiff's affidavit, was that he should receive payment of his pension in the country in which he might be living at the time when it accrued. In 1938, the defendants knew that the plaintiff was living in England. On November 11, 1938, they sent him, at the Cumberland Hotel in London, a credit note in respect of his pension for the period from August to November, 1938, and in February, 1939, they wrote to him at 93, Redington Road, Hampstead, a house which he had bought as his residence and which he still owns. The defendants have also exhibited in their affidavits letters written by the plaintiff to the defendants in April, May, July and August, 1939, all from the same address, 93, Redington Road, Hampstead. If the oral agreement as regards payment of his pension was made as alleged by the plaintiff, I think that the agreement must be taken as an agreement to pay in London, if the plaintiff was living in London to the knowledge of the defendants. For these reasons I think that leave should be given to the plaintiff to serve notice of his writ in respect of his claim for breach of contract to pay his pension. This will involve a trial in London, and the attendance of such witnesses as the defendants see fit to send to London to contest the plaintiff's claim.

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(1) [1949] A. C. 326.

(2) [1908] P. 189.

As regards the claim under the service contract, I do not think that the plaintiff has made out a clear prima facie agreement that there has been a breach of that contract for payments in London, but I would give leave to serve notice of the writ, which includes his claim in respect of the alleged breach of the service agreement. I would limit the leave by including words such as: "with regard to the claim "under the service agreement leave is limited to the extent "that the plaintiff undertakes that if it appears that his "claim under the service agreement was not payable within "the jurisdiction he is not to obtain judgment on that head "of claim."

As regards the question of forum conveniens, I think that it will be much easier for the defendants to bring their witnesses here than it will be for the plaintiff to go there to attend the trial of his claim. There are good reasons for this view, which are set out in the documents filed on behalf of the plaintiff. To quote the words of Morton L.J., in *Malik's* case (1): "There are strong grounds of justice for allowing "the plaintiff to bring his action here." I would therefore allow this appeal.

SINGLETON L.J. [stated the facts and continued:] The account given by the plaintiff of his conversation with Dr. Sonnenschein in January, 1929, is of great importance. It is not easy for the defendants to refute it now, for Dr. Sonnenschein died on September 26, 1939. Still, they could have communicated with him in regard to the letter of November 23, 1938—we do not know whether they did so or not, but the letter raised questions on which it would have been a natural thing for them to do. The main question for consideration seems to me to be whether the court ought to accept the plaintiff's account of that which took place between him and Dr. Sonnenschein and, in particular, of the statement: "It was expressly agreed by Dr. A. Sonnenschein who was "the general manager of the defendants and was acting on "their behalf that I should receive payment of my pension "in the country in which I might be living at the time it "accrued. It was for this reason that at my request the clause "providing for the payment of the full gold value was "inserted . . . ." Speaking for myself, I think it is the most natural thing in the world that sight of his letter of November 23, 1938, should bring to the mind of the plaintiff the circumstances in which he wrote it, and how and why he put into it the words, "The gold clause was requested with "the express argumentation that I am going to overseas." It seems to me to bear out the conversation which he says he had with Dr. Sonnenschein in 1929. In this respect, I find myself differing from Slade J., who was not satisfied "that there was any express term of the agreement or "any manifestation of intention which ought, according to "Czech law, to be treated as though it were part of the "agreement." I assume that this means that the judge did not accept the account given by the plaintiff of his arrangement with Dr. Sonnenschein. I take the view that there is no reason why the court should not accept it: indeed, I think we ought to accept it. It does not appear to me to be the weaker, or less likely to be true, because it appears for the first time in the second affidavit of the plaintiff. No question of failure to make full disclosure arises. No one can be expected to remember accurately the details of a conversation, or the precise terms of an agreement, made ten or twenty years earlier, and the production of a document such as the letter of November 23, 1938, may well lead to a much more complete account. It may, of course, give rise to a false account, but there is nothing to lead me to the view that it has done so in this case. It was open to the defendants, if there was doubt as to the plaintiff's veracity, to apply that he should attend for cross-examination on his affidavit but no such application was made.

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(1) 176 L. T. 136, 139 [1946] 2 All E. R. 663, 667.

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The plaintiff's evidence is assisted (*a*) by the gold clause in the letter of January 18, 1929, (*b*) by the fact that he was to be paid in sterling under the consultant agreement of March, 1938, and (*c*) to a less degree by the fact that the pension account in the defendants' records is marked "Ausl. Kc." If one accepts the plaintiff's account of his conversation with Dr. Sonnenschein and his uncontradicted account of his conversations with other officials, it is clear that the defendants knew of his intention to live abroad—indeed, in regard to the consultant agreement they wished him to live in one of three named places in Europe.

In his second affidavit, Dr. Bobasch sets out article 914 of the Czech Civil Code. I will read para. 3 of that affidavit: "In Czech law the intentions of the parties at the time of "contracting and the agreements then made by them form "part of the contract and are enforceable as such even though "they are not expressly included in the written document "which may be drawn up subsequently as a record of the "contract. This is considered to be a matter of interpretation "in accordance with article 914 of the Czechoslovak Civil "Code which provides: 'In the interpretation of contracts "'one should not adhere to the literal meaning of expressions, "'but should examine the intention of the parties and interpret "'the contract in a manner consistent with fair dealing.'" The affidavit continues: "It follows from this principle "that, if at the time the plaintiff's pension agreement was "made the parties contemplated that he would live abroad "when he drew the pension and intended that it should be paid "to him where he might live, it would be so payable. The "defendants would therefore be in breach of contract if they "failed to pay him his pension at his place of residence and "in accordance with the rates of exchange prevailing there." I do not find that Dr. Bobasch's statement of the law in this respect is in dispute.

The plaintiff's case on the pension claim was put by Sir Andrew Clark as depending on an oral agreement of which the letter of January 18, 1929, was evidence in support. Accepting, as I do, the plaintiff's sworn testimony, I consider that the intention of the parties in 1929 was that the pension should be paid abroad at the place at which the plaintiff should be living and that according to Czech law there was an agreement to that effect. That agreement was certainly not weakened by the agreement of 1938: rather otherwise. At that time the defendants wished the plaintiff to live in either Zurich, Paris or London, and they agreed to pay him his remuneration quarterly in sterling. Again, applying article 914, I think there was agreement to pay him at the one of those three places at which he should be residing—and, since 1938, that place has been London and the defendants have had his address.

Having regard to the view which I have expressed, it is not necessary for me to deal with the arguments addressed to the court on article 905. One Pelc, a Czech lawyer, who swore two affidavits on behalf of the defendants, raises a point to the effect that an agreement to oust the application of article 905 could be constituted by the crediting of the payments to the plaintiff's account in Czechoslovakia without objection by him. I doubt whether the crediting of amounts over a short period during which the plaintiff was indebted to the defendants could have any such effect. In any event, such a course of action could not avoid the agreement to pay abroad (or in London) which, in my view, was the true position.

I respectfully agree with Slade J., in his statement of the law. There are two entirely separate questions for consideration. In the first place, it is for the plaintiff to show that he has a case fit and proper to be tried with a reasonable chance of success. It is not for the court on this application to try the case or to be sure that the plaintiff will succeed on his claim. I refer to the speech of Lord Porter in *Tyne Commissioners* v. *Armement Anversois S/A* (*The Brabo*) (1). Lord Porter's view is summarized at the end of the headnote to the report in these words: "though leave should be given when a substantial question of fact is in issue and possibly also when there is an exceptionally difficult and doubtful point of law." I do not propose to go into this part of the case further than to say that it is clear that there are substantial questions of fact in issue on which the plaintiff may well succeed, and that involved questions as to the law of Czechoslovakia arise. Prima facie, the plaintiff is entitled to payment of the pension, and it would appear that there is money due on the consultant's agreement even though it was put an end to by the outbreak of war.

Secondly, it is for the plaintiff to show that the breach of contract, if there was one, took place within the jurisdiction.

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(1) [1949] A. C. 326, 338–341.

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It is only on this application that this point falls to be decided, and unless the plaintiff can show it to the satisfaction of the court he ought not to be given leave to serve his writ out of the jurisdiction in a case under this part of Order 11. Something arising within the jurisdiction—in this case the breach—is essential to the plaintiff's application. In *Malik's* case (1), the facts were quite different from those of the case now before the court and leave was refused. Lord Goddard C.J., in the course of his judgment said (2): " Therefore the court has " to be satisfied on the affidavits that the action is brought " in respect of a breach committed within the jurisdiction "; and (3): " Certainly, since I have known anything about the " practice . . . . the court has always asked itself the single " question: Is it shown clearly on the affidavits that the " breach occurred within the jurisdiction, or is it not so shown? " If it is shown that the breach occurred within the jurisdiction, leave can be given. If it is not so shown, as I have " always understood it, leave cannot be given." Morton L.J., said (4): " I agree that this appeal should be dismissed because " it is not shown that a breach of contract has been committed within the jurisdiction. That being so this court " has no discretion to allow service of notice of the writ out of " the jurisdiction."

These expressions of opinion are in complete accord with the view of the House of Lords in *Comber* v. *Leyland and Bullins* (5), and of the Privy Council in *Hemelryck* v. *William Lyall Shipbuilding Co. Ld.* (6): see the judgment of Lord Buckmaster (7).

Let me add this: I take the view that the plaintiff has shown that a breach, or breaches, of contract took place within the jurisdiction. I do not disguise from myself that it may be extraordinarily difficult in some cases to be certain of this on evidence given by affidavit. A different complexion might be put upon the matter when witnesses are heard and when they are cross-examined. I do not think that that thought ought to stand in the way of leave being given in a case such as this, if it is felt that there is no sound reason shown for disbelieving that to which the plaintiff has deposed, especially so when no application to cross-examine him has been made. Though, for the reasons I have given, I think that leave ought to be given unconditionally, I am not unmindful of the fact that the course suggested by Bucknill L.J., of giving conditional leave—a course which was approved by this court in the year 1886 in *Thomas* v. *Hamilton* (*Dowager Duchess*) (1)—is one which would preserve the defendants' rights completely and would at the same time enable the plaintiff to have his claim heard. I do not think that in any event that course would result in hardship to the defendants, scattered as the witnesses appear to be.

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(1) (1946) 176 L. T. 136; [1946] 2 All E. R. 663.

(2) Ibid. 137; 665.

(3) Ibid. 139; 666.

(4) Ibid. 139; 667.

(5) [1898] A. C. 524.

(6) [1921] 1 A. C. 698.

(7) Ibid, 701.

I take a different view of the facts from that taken by Slade J. It is essential to make up one's mind whether one accepts the statement of the plaintiff. If one does—as I do—effect must be given to it. The only real criticism which I venture to make of the judgment of Slade J., arises from his rejection of, or his passing over, that part of the plaintiff's second affidavit which refers to the conversation and oral agreement said to have been made with Dr. Sonnenschein, and in his failure to apply that along with the written documents in accordance with article 914 of the Czechoslovak Code. It may be said that this is largely a matter of discretion, though I look upon it rather as failure to give due, or any, weight to the uncontradicted evidence of a witness against whose honour, so far as I know, no one can say one word. The same applies in a less degree to the conversations with the other officials.

On the question of forum conveniens and the general discretion of the court, I hold the view that upon the evidence the case is a proper one for service out of the jurisdiction. That was the view which Morton L.J. formed in *Malik's* case (2). I consider that the facts in the present case point even more strongly to this as being the right course. In my opinion the plaintiff brings himself within the provisions of Or. 11, and I would allow the appeal.

DENNING L.J. [whose judgment was read by SINGLETON L.J.] The first question in this case raises a nice problem in the doctrine of precedent: is this court bound to accept the test laid down by the Lord Goddard C.J., in *Malik* v. *Narodni Banka Ceskoslovenska* (2), or is what he said merely

(1) 17 Q. B. D. 592.

(2) (1946) 176 L. T. 136; [1946] 2 All E. R. 663.

obiter dictum ? In my opinion the test was part of the ratio decidendi. The court was there faced with two rival tests and chose one of them which it then applied to the facts; and it reached a certain conclusion. The selection of the right test was therefore one of the links in the chain of reasoning, and I do not think it would be right for us to dismiss it as mere obiter dictum, that is, as a statement made merely by the way (*Flower* v. *Ebbw Vale Steel, Iron & Coal Co. Ld.* (1). It is said that if the court had chosen the other test, they would still have come to the same conclusion. I am not so sure of that, because I have not seen the evidence which was before them. But even if they would have done, it does not mean that their test is of no authority. It may not be absolutely binding on us, but we ought to follow it unless there are strong reasons for not doing so. One such strong reason would be any comments or reasoning by the House of Lords tending to throw doubt on it. It was indeed suggested to us that the House of Lords in *Tyne Improvement Commissioners* v. *Armement Anversois S/A* (*The Brabo*) (2) had laid down a different test; and if the headnote were correct it would look as if Lord Porter had done so. But, when his speech is read carefully, it becomes clear that his remarks were confined to the question when an action could be said to be " properly brought " within Or. 11, r. 1 (*g*), and have no application to Or. 11, r. 1 (*e*).

Another strong reason would arise if it could be demonstrated that the test laid down in *Malik's* case (3) was wrong; but I do not think that that has been demonstrated. That case was concerned, as is this case, with a contract made by foreigners in a foreign country and governed by the law of that foreign country; and one of the parties to it now seeks to compel the other to come to this country to litigate it against his wish. As matter of high policy, I do not think that in such a case these courts should lend their aid to this course unless they are satisfied that they have jurisdiction to do so. Even if we disapprove of the way in which justice is administered in the foreign country, that is no justification for our usurping a jurisdiction which does not properly belong to us.

The only possible ground that is put forward for saying that this court has jurisdiction is that it is said that the contracts were to be performed in this country and were broken

(1) [1934] 2 K. B. 132, 154.
(2) [1949] A. C. 326.
(3) 176 L. T. 136; [1946] 2 All E. R. 663.

here. If the written contracts had contained a term requiring performance here, that would be a safe ground on which to act. But, when the written contracts are examined, it is seen that in this case, as in *Malik's* case (1), there is no term in either contract requiring it to be performed here. Resort is therefore had to implications and inferences and oral conversations. This is not very promising material with which to build a safe foundation for an extended jurisdiction: and I should not myself think that the case is a "proper one for service out of "the jurisdiction" within Or. 11, r. 4, unless I were satisfied that the foundation was safe. At any rate, that was the view of this court in *Malik's* case (1), and I am certainly not prepared to say they were wrong. In my opinion, therefore, in cases such as *Malik's* case (1) and the present case, this court should accept and apply the test laid down by the Lord Goddard C.J.

The next question is whether there is sufficient material to satisfy the court that the contract was to be performed here. It is said that the moneys due under the pension agreement and the service agreement were payable to the creditor at the place where he was living; and that, as he was living here, they were payable here. On this point much reliance was placed on the law of Czechoslovakia, but on the evidence I agree with Tucker L.J., in *Malik's* case (1) that it is very similar to English law on the subject. If there is no stipulation as to the place of payment, it is in general there, as here, the duty of the debtor to seek out the creditor at whatever place he happens to be. But in English law that is subject to the qualification that, if the contract is an English one, and the creditor was within the realm when it was made, then the debtor is not in general bound to follow him to a foreign country to pay him: see *Fessard* v. *Mugnier* (2). The debtor would no doubt satisfy his obligation by holding the amount here in readiness for the creditor's return or by placing it to his credit here or by remitting it on request to the foreign address of the creditor, at the creditor's risk and expense. If he failed to do any of these things, the breach would be committed in this country and not abroad, because the duty is not to pay abroad, but to pay here or to remit from here. As I read the evidence, there is nothing in the Code of Czechoslovakia which deals expressly with the position where the creditor, after making

(1) 176 L. T. 136; [1946] 2 All E. R. 663.

(2) (1865) 18 C. B. (N. S.) 286.

the contract in Czechoslovakia, goes abroad; but article 905 of the Code does say that, if the creditor changes his residence, the debtor is to remit the money to the new residence at the creditor's risk and expense. That looks as if, even if the creditor goes to a new residence in Czechoslovakia, the debtor is not bound to follow the creditor to the new residence, but only bound to remit to him there. The evidence is that the same rule applies where the creditor goes abroad; so that it looks as if the debtor is not bound to follow the creditor abroad, but only to remit to him there. Moreover, article 1425 of the Code says that if a debt cannot be paid because the creditor is absent, the debtor can obtain a good discharge by depositing the money in court. These provisions show to my mind that the debtor is not bound to follow the creditor abroad. At any rate, I see no evidence sufficient to rebut the presumption that the law of Czechoslovakia is the same as English law on the point.

Nor do I think that the plaintiff derives any assistance from the presence of the gold clause in the pensions agreement or the fact that after 1938 his account was kept in Auszland Kronen or that the service agreement of 1938 provided for payment in sterling. Those features certainly show that he wanted to safeguard himself from depreciation of the Czechoslovakian currency. They also support his story that he intended to live abroad and told the company of his intention. But they do not show that the company agreed to follow him to a foreign country to pay him. All those features are quite consistent with the view that the duty of the company was to remit from Czechoslovakia to him abroad. Their duty was done in Czechoslovakia when they posted the money to him or otherwise remitted it to him. Thereafter it was at his risk and expense. If they were bound to pay him in England, or any other country where he happened to be, it would mean that they would have to see that the money actually reached him abroad, which would mean that, whilst in transit, it would be at their own risk and expense: but article 905 of their Code shows that is not their law. This distinction, between paying in another country and remitting to that other country, has frequently been recognized, and forms the basis of the decisions in *Comber* v. *Leyland and Bullins* (1) and

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(1) [1898] A. C. 524.

St. Pierre and Others v. *South American Stores* (*Gath and Chaves Ld.*) *and Another* (1).

I am confirmed in this view by the practice of the parties: it is quite plain that never in the course of these agreements did the company follow him abroad to pay him; they credited his account in Czechoslovakia and made remittances from that account in accordance with his instructions. It is most significant that in 1939, when they stopped payment under the service agreement, his only complaint was that they had not placed the amounts to his credit in Czechoslovakia: see his letters from April to August, 1939. The whole course of conduct of the parties shows to my mind that the obligation of the company was to credit him in Czechoslovakia and to remit from there—quite the reverse of the position in *Rein* v. *Stein* (2). The plaintiff sought to overcome this difficulty by saying that he was indebted to the company on contra-account and that the credits were made in Czechoslovakia in order to discharge the contra-account. That explanation, however, will not work, because the accounts and letters show that the credits were used not merely to discharge the contra-account, but also to make remittances from Czechoslovakia to relatives and others in Czechoslovakia and abroad.

All these points failing, therefore, the plaintiff relies on an oral agreement that he should receive payment of his pension in the country in which he might be living at the time it accrued. This is, as Singleton L.J. has said, the main point for consideration. I cannot regard it as a safe foundation for an extended jurisdiction, for these reasons:—

(i.) It was not mentioned in the writ or in the affidavit on which the application was based. It is therefore an indulgence to allow him to set it up at all: see *Bremer Oeltransport G.M.B.H.* v. *Drewry* (3).

(ii.) It is impossible to suppose that the plaintiff can have any accurate recollection about it; for even according to him it was made twenty years ago in the course of a conversation with a man who is now dead and unable to contradict the plaintiff's account of it. He has no memorandum of it, and he admitted that in April, 1946, when he brought this action, he had forgotten its existence. He remembered it later in the action after May, 1947, that is, after *Malik's* case (1) had been decided, and when it was very much in his interest to find, if he could, a firm contract to pay him here.

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(1) (1937) 42 Com. Cas. 363; [1937] 1 All E. R. 206; [1937] 3 All E. R. 349.

(2) [1892] 1 Q. B. 753.

(3) [1933] 1 K. B. 753, 765.

(iii.) According to English law, the alleged oral agreement would be inadmissible in evidence, because it seeks to add a term to a subsequent written agreement. The plaintiff says it was made in the course of the negotiations before the terms were set down in writing. The company's letter of January 18, 1929, by the very wording of it, shows that that letter was intended to record in writing that which had been agreed. It says that "the agreements hitherto in force . . . . are "annulled and the following covenants shall apply in place and "stead thereof." It was, I should have thought, plainly a written contract: see *L'Estrange* v. *F. Graucob Ld.* (2).

Accordingly, in English law no evidence of prior negotiations would be admissible to add to it or to vary it. This is no technical rule: it is based on sound sense, because when people, after preliminary negotiations, set down their agreement in writing, they record those terms by which they intend to be bound, and put aside the rest. The writing is the grand criterion of what terms were intended to be contractual and what were not.

This applies with especial force in this case, because the previous oral agreement is said to have been made in the course of negotiations between the plaintiff, who was the managing director of the company, and a Dr. Sonnenschein, who was the general manager. Can anyone suppose that this oral agreement was put before the board of management of the company? The letter presumably was put before the board, because it contained the contractual terms; but it is very unlikely that the oral conversations were put before the board. There was and is no record of them, and I cannot believe that they contained any contractual terms.

(iv.) If I am right in thinking that in English law no evidence of this oral agreement can be admitted, it means that it cannot be admitted at the trial of this action if it is allowed to proceed. The rule of our law which says that documents are exclusive evidence of the transaction which they embody is a rule of evidence, and, as such, it is to be applied by our courts even

(1) 176 L. T. 136; [1946] 2 All E. R. 663.

(2) [1934] 2 K. B. 394.

when they deal with foreign contracts; because, by private international law, the court of trial applies its own rules of evidence just as it applies its own mode of trial: see *Yates* v. *Thompson* (1), *Bain* v. *Whitehaven and Furness Junction Railway Co.* (2), and *Leroux* v. *Brown* (3).

In contrast, I must point out that our rules for the interpretation of contracts—by which we usually exclude oral evidence except to explain technical terms—are not, strictly speaking, rules of evidence at all—because they concern construction and not proof. The distinction is well pointed out by Sir James Fitzjames Stephen in Notes XIV and XV on articles 97 and 98 of his Digest of the Law of Evidence (12th ed.) When it comes, therefore, to the interpretation of a foreign contract, our courts apply the foreign law; and if by the foreign law—as by article 914 of the Czechoslovakian Code—oral evidence is admissible to interpret the document, it will be admitted here: see *St. Pierre* v. *South American Stores (Gath and Chaves Ld.)* (4). The present case, however, is not one of interpretation, but of adding a term to a written contract, and our rules of evidence apply so as to prevent that addition.

(v.) Even if the oral evidence is admitted, I am not satisfied that there was any agreement which required the company to follow the plaintiff into whatever country he may be living. Much would depend on the precise words used. It would need very strong words to put on the company an obligation not only to remit from Czechoslovakia but also to pay in any other country. I do not think that the words to which the plaintiff speaks are sufficient for the purpose.

For these reasons I am of opinion that the evidence either is not admissible or, if admissible, is valueless. I am therefore not satisfied that the case is a proper one for service out of the jurisdiction. I can appreciate the desire of the plaintiff to get payment from the assets in this country, and, if there really was a promise to pay him here, all well and good: we ought to make the foreigner pay him here. But if there was no such promise—if the supposed promise is only an afterthought, put forward to bolster up his case—then, however good his object, it is vitiated by the means he has employed to achieve it. This court has never allowed a good end to

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(1) (1835) 3 Cl. & F. 544.
(2) (1850) 3 H. L. C. 15.
(3) (1852) 12 C. B. 801.
(4) 42 Com. Cas. 363; [1937] 1 All E. R. 206; [1937] 3 All E. R. 349.

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justify a bad means, and I trust it never will. I find myself, therefore, in full agreement with Slade J., and I would dismiss the appeal.

Even if leave is to be given, I should have thought that the case was open to such doubt that there should at least be a condition precluding the plaintiff from recovering except in regard to such breaches, if any, as are proved to have occurred within the jurisdiction: see *Thomas* v. *Hamilton (Dowager Duchess)* (1). I would prefer, however, to refuse leave altogether, because I agree with Lord Goddard C.J., that it is undesirable to attach such a condition. The question whether there has been a breach within the jurisdiction is a preliminary point going to jurisdiction only, and it should be decided here and now, before the expense of a trial is incurred.

Appeal allowed. Claim for salary under the service agreement to be limited, so that if it should appear on the trial that this claim was not payable in London, the plaintiff was not to recover judgment for it.

Leave to appeal to the House of Lords.

Solicitor: *Rubinstein, Nash & Co.; Blyth, Dutton, Wright and Bennett.*

(1) 17 Q. B. D. 592.

C. G. M.

C. C. A.
1950
Mar. 6, 15.
Lord Goddard C.J., Humphreys and Birkett JJ.

REX *v.* KELLY

Jury—Criminal law—Juror subsequently discovered to have been convicted of felony—" Attainted of felony "—Construction—Presence of juror's name on jurors' book—Effect of disqualification or exemption—Circumstances in which new trial would be ordered—Juries Act, 1870 (33 & 34 *Vict., c.* 77), *s.* 10*—Juries Act,* 1922 (12 & 13 *Geo.* 5, *c.* 11), *s.* 2, *sub-s.* 1.

By s. 10 of the Juries Act, 1870, which came into force on August 9 of that year: ". . . . no man who has been or shall " be attainted of any treason or felony, or convicted of any crime "that is infamous, unless he shall have obtained a free pardon, "nor any man who is under outlawry, is or shall be qualified to "serve on juries . . . ."

After July 4, 1870, the date of coming into force of the Forfeiture Act, 1870, which abolished forfeiture for treason and felony, attainder no longer existed except with regard to persons who were outlawed or were already under the disability of attainder on the passing of the Act, and the words "shall be" in s. 10 of the Juries Act, 1870, must be construed as referring to persons convicted after August 9, 1870, of an infamous crime. Moreover, the words "attainted of any . . . . felony" cannot be read as meaning "convicted of any felony." Accordingly, a person who has been convicted of the felony of receiving stolen property has not been "attainted" within the meaning of s. 10 and is not disqualified on that ground from serving as a juror.

If a person's name is once on the jurors book, then he is liable, by virtue of s. 2, sub-s. 1, of the Juries Act, 1922, to serve as a juror; for that Act provides in terms that a person whose name is on the jurors book is liable to serve as a juror. Accordingly it is immaterial whether any person on the jurors book called to serve on a jury has or has not claimed any exemption to which he is entitled, and immaterial that the registration officer would not have included his name in the book if he had known of the disqualification.

The principle that the Court of Criminal Appeal will order a new trial where information comes to light after a trial which would have enabled the accused person, had he had it, to have challenged one of the jurors, has only been applied in cases where there has been impersonation, or mistake as to the identity, of a juror.

Where, therefore, after the conviction of a man of murder it came to light that one of the jurors at the trial, whose name duly appeared in the jurors book, had previously been convicted of receiving stolen property and sentenced to one month's imprisonment,

Held, that, on all the grounds above stated, no objection was open to the accused person, and that he had no right to a venire de novo.

Semble, the expression "free pardon" in s. 10 of the Juries Act, 1870, refers to the obtaining of an actual free pardon, and not to one implied by virtue of the Civil Rights of Convicts Act, 1828, s. 3.

Rex v. *Sutton* (1828) 8 B. & C. 417, applied.

Appeal from conviction.

The appellant, George Kelly, was convicted of murder on February 8, 1950, at Liverpool Assizes. After that trial it came to light that one of the jurors had five years before been convicted of receiving stolen property and sentenced to one month's imprisonment. He had served that sentence.

The name of the juryman in question appeared in the jurors book as that of a person qualified and liable to serve as a juror; he was duly summoned; his name appeared on the panel of jurors; he was duly called; was unchallenged; and was sworn.

The appeal against conviction was based on the above facts, and on other grounds not calling for report.

Rose Heilbron K.C. and *R. S. Trotter* for the appellant. At common law a person convicted of felony was disqualified from serving on a jury: Hale, Pleas of the Crown, vol. 2, p. 277; Bacon's Abridgement, vol. 3, p. 254. The position under s. 10 of the Juries Act, 1870, is not so clear because of the use of the word "attainted." But "attainted," in that context, means only convicted. A person convicted of felony is "attainted" when sentence has been passed on him. Coke C.J., in expressing the common-law rule in *Brown* v. *Crashaw* (1), used the word "attainted": "If one be attainted of felony, and "pardoned, he shall not afterwards be sworn of a jury for "that he is not probus et legalis homo." In Halsbury, Laws of England (2nd ed.), vol. 19, p. 284, it is stated that "persons "at any time convicted of treason or felony" are disqualified from serving on juries. The Juries Act, 1870, was passed on August 9. The Forfeiture Act, 1870, was passed on July 4, a month earlier. But the Forfeiture Act abolished "attainder" in its technical sense. Therefore the word "attainted" in s. 10 of the Juries Act cannot mean "attainted" in that sense, for the section refers to a man who "shall be attainted."

Section 3 of the Civil Rights of Convicts Act, 1828 (2), does not diminish the common-law or statutory prohibition against a person once convicted of felony from serving on a jury.

[LORD GODDARD C.J. Does not the Administration of Justice (Miscellaneous Provisions) Act, 1938, present a formidable argument in your favour? Section 12 abolished outlawry proceedings, and s. 20, sub-s. 3, and sch. IV repealed the words " nor any man who is under outlawry " in s. 10 of the Juries Act, 1870. Why were the words relating to attaint not also repealed unless " attainted " in that section only means convicted ? Parliament by the Act of 1938 recognized the continuing validity of the Juries Act, 1870, s. 10, except as then amended by it.]

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(1) (1624) 2 Bulstrode 154.

(2) Civil Rights of Convicts Act, 1828 (9 Geo. 4, c. 32), s. 3: "Where any offender hath been or "shall be convicted of any felony "not punishable with death, and "hath endured or shall endure "the punishment to which such "offender hath been or shall be "adjudged for the same, the "punishment so endured hath and "shall have the like effects and "consequences as a pardon under "the Great Seal as to the felony "whereof the offender was so "convicted."

Reference may be made to *Reg.* v. *Vine* (1) and *Hay* v. *London Justices* (2).

[LORD GODDARD C.J. But was the disqualification ever more than a matter of challenge at common law ?]

If there is anything wrong with the composition of the jury the trial is a nullity : *Rex* v. *Wakefield* (3), *Reg.* v. *Mellor* (4) ; *Rex* v. *Tremearne* (5). As the juryman in question in the present case was disqualified from serving, the trial was a nullity, and the court have a discretion either to order a new trial or to quash the conviction : see *Rex* v. *Olivo* (6).

Gorman K.C. and *Glynn Blackledge* for the prosecution. The Administration of Justice (Miscellaneous Provisions) Act, 1938, does not affect the position at all. The juryman in question was never attainted of felony, nor was he convicted of an infamous crime, and s. 10 of the Juries Act, 1870, cannot, therefore, apply to him.

" Attainder " is defined in the Encyclopædia of the Laws of England (3rd ed.), vol. 1, p. 652 : " Attainder means neither " a conviction nor the results of a conviction, but the results " of judgment following on conviction, or judgment of out- " lawry in cases of treason or capital felony . . . . But " attainder upon judgment or outlawry no longer exists." Attainder was abolished by the Forfeiture Act, 1870, s. 1. It follows that the juryman in question was not attainted.

Section 10 of the Juries Act, 1870, refers to a man " who " has been or shall be attainted of any treason or felony, " or convicted of any crime that is infamous." The words " or shall be " can only be construed to refer to " convicted " of an infamous crime. Section 46 of the Larceny Act, 1861, defines " infamous crime " as " the abominable crime of " buggery . . . . and every assault with intent to commit " the said abominable crime, and every attempt or endeavour " to commit the said abominable crime, etc." Buggery is a felony, while an attempt or assault with intent to commit buggery is a misdemeanor. The reference to infamous crime in s. 10 of the Juries Act, 1870, in so far as it included buggery, would have been unnecessary if " attainted " meant convicted. There was a real difference between attainder and conviction.

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(1) (1875) L. R. 10 Q. B. 195.
(2) (1890) 24 Q. B. D. 561.
(3) [1918] 1 K. B. 216.
(4) (1858) Dears. & B. 468.
(5) (1826) 5 B. & C. 254.
(6) (1942) 28 Cr. App. R. 173.

[Counsel referred to the definition of " attainder " in Wharton's Law Lexicon (14th ed.), p. 93.] Attainder signified the stain or corruption of the blood of a criminal capitally condemned. It applied only in the case of a capital felony and, had not attainder been abolished, the juryman in question would nevertheless not have been attainted because the felony that he committed was not a capital one.

The word " attainted " was retained in the Juries Act, 1870, to cover persons already then attainted, as s. 1 of the Forfeiture Act, 1870, had not altered the position of such persons, and the words " or shall be " refer only to conviction of an infamous crime.

[LORD GODDARD C.J. Why were the words " attainted of " any treason or felony " in s. 10 of the Juries Act, 1870, not repealed by the Administration of Justice (Miscellaneous Provisions) Act, 1938? The latter Act repealed the words " nor any man who is under outlawry " in s. 10 of the former Act.]

[HILBERY J. Is not the answer that s. 1 of the Forfeiture Act, 1870, expressly provided that nothing in that Act should affect the law of forfeiture consequent upon outlawry, and that it was therefore necessary expressly to provide for the matter in the Act of 1938, whereas attainder had already been abolished by the Forfeiture Act ?]

In any event, s. 10 of the Juries Act, 1870, does not apply if the person in question, " shall have obtained a free pardon." The juryman had served his sentence and, by s. 3 of the Civil Rights of Convicts' Act, 1828, that " hath and shall have the " like effects and consequences as a pardon under the Great " Seal." It follows that on that ground also he is not disqualified.

Rose Heilbron K.C. in reply. As regards the last point, that might have been correct had the matter been governed by the Juries Act, 1825, s. 3. But that provision has been replaced by the Juries Act, 1870, which then became the only statutory provision with regard to such disqualification. Section 3 of the Civil Rights of Convicts Act, 1828, cannot affect the meaning of the Juries Act, 1870.

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[Birkett J. Where a man is empanelled on a jury, is that not conclusive that he was qualified to serve by s. 2, sub-s. 1, of the Juries Act, 1922 (1) ?]

The Act of 1922 does not affect the right of the prisoner to be tried by qualified jurors : it only affects the right of the juryman to be exempted from serving. The Act of 1938 left in being s. 10 of the Act of 1870. The Act of 1922 cannot, for instance, affect the prisoner's right of challenge : see Archbold, Criminal Pleading (32nd ed.), p. 179. His right to be tried by a duly qualified jury remains.

[Lord Goddard C.J. Lord Tenterden C.J., said in *Rex* v. *Sutton* (2) : " I am not aware that a new trial has ever " been granted on the ground that a juror was liable to be " challenged, if the party had an opportunity of making his " challenge." That is a formidable authority in your way. In the personation cases such as *Rex* v. *Wakefield* (3) which you have cited the prisoner was deprived of his right of challenge.]

The appellant also was deprived of his right of challenge. He could not challenge because he did not know that the juryman in question was disqualified. In *Rex* v. *Tremearne* (4), the court proceeded on the ground that the juror who in fact sat was disqualified, not because he was not the juror empanelled. The accent in the personation cases was on the disqualification of the person sitting.

[Counsel cited *Ras Behari Lal* v. *Regem* (5).]

Cur. adv. vult.

Mar. 15. Lord Goddard C.J., read the following judgment of the court. Counsel for the appellant submitted that there had been a mis-trial in that one of the jurors was disqualified from sitting on a jury. The ground of disqualification alleged was that the juryman in question had been convicted of felony. It was said that by s. 10 of the Juries Act, 1870, the conviction constituted such a disqualification that the trial must be

(1) Juries Act, 1922, s. 2, sub-s. 1 : " Every person whose " name is included in the jurors " book as a juror or special " juror shall be liable to serve as " such, notwithstanding that he " may have been entitled by reason " of some disqualification or " exemption to claim that he " ought not to be marked in the " electors list as a juror or special " juror."

(2) (1828) 8 B. &. C. 417, 419.

(3) [1918] 1 K. B. 216.

(4) 5 B. &. C. 254.

(5) (1933) 50 T. L. R. 1.

considered to have taken place, not before twelve, but only before eleven jurymen; that that would constitute a mis-trial; and that the court would be obliged to award a venire de novo. This, indeed, would have been the result if this court had been obliged to give effect to the objection, and a further trial would have had to take place.

The first statute to which it is necessary to refer is the Juries Act, 1870, s. 10 of which provides: " . . . . no man " who has been or shall be attainted of any treason or felony " or convicted of any crime that is infamous, unless he shall " have obtained a free pardon, nor any man who is under " outlawry, is or shall be qualified to serve on juries or inquests " in any court or on any occasion whatsoever." That Act, in effect, re-enacts s. 3 of the Juries Act, 1825. I pause here to say that counsel for the appellant contended that at common law a convicted felon was disqualified from serving on a jury, citing in support passages from Hale's Pleas of the Crown and other works of authority. The court, however, is of opinion that since 1825 the qualifications and exemptions of jurors are governed by statute law and that we have to consider, not what the law may have been, and, no doubt, was, in the time of Hale, but what provisions Parliament has made on the subject by the various Acts concerning juries that have been passed from 1825 onwards. We are satisfied that the whole law on this subject now is statutory. The importance of this case is manifest, as conflicting views are disclosed in textbooks which refer to the matter, and the exact point seems never to have been the subject of an express decision; although as I shall explain before the end of this judgment, a point which is in our opinion indistinguishable was the subject of a decision by a court of high authority in 1828; that is, very soon after the first Juries Act had been passed.

It will be observed that s. 10 of the Juries Act, 1870, concerns three classes of person: those attainted of treason or felony; those convicted of any crime that is infamous (in either case unless they shall obtain a free pardon); and those who were under outlawry. Outlawry has been abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, and need no longer be considered. An infamous crime is shown by s. 46 of the Larceny Act, 1861, to mean buggery, an assault with intent to commit buggery, and an attempt to commit buggery; and, as the juryman in question had not, therefore, been convicted of a crime which was infamous, the remaining point to be decided is whether he was a person attainted of felony.

No doubt, the distinction between "convicted" and "attainted" has often been regarded as being that between the verdict of the jury and the sentence of the court; but the true meaning of "attainted" is the result of a judgment following on conviction or judgment of outlawry in cases of treason or capital felony. If a person were convicted, but no judgment were passed, attaint would not follow. The attaint was the result of the judgment in a capital case because thereby corruption of blood, with all its consequences under the old law, followed: see, on this point, the article on attainder in the Encyclopædia of the Laws of England (3rd ed., vol. 1), p. 652, the author of which was Sir William Anson.

The Juries Act, 1870, received the Royal Assent on August 9, 1870; but a month before—namely, on July 4 of that year, the Forfeiture Act, 1870, which abolishes forfeitures for treason and felony, was passed. The preamble to that Act states: "Whereas it is expedient to abolish the forfeiture "of lands and goods for treason and felony . . . ." which, be it observed, as regards land, was a consequence of an attaint. The Act goes on to provide in s. 1: "From and after the passing "of this Act, no confession, verdict, inquest, conviction, or "judgment of or for any treason or felony or felo de se shall "cause any attainder or corruption of blood, or any forfeiture "or escheat, provided that nothing in this Act shall affect "the law of forfeiture consequent upon outlawry."

It is to be observed that the Act makes no distinction between verdict, conviction, or judgment as the cause of the attainder; but it seems clear that after July 4, 1870, there was no such thing left in the law as attainder except in regard to persons who were outlawed or already under that disability at the time of the passing of the Act. It is true that in the Juries Act, 1870, the words are "who has been or shall be attainted of "any treason" etc.; but, in our opinion the words "shall be" must be taken as referring to a person who may in the future be convicted of any crime that is infamous. It is impossible to suppose that attainder could have remained for any purpose once it had been deliberately abolished by s. 1 of the Forfeiture Act, 1870, except in the case of outlawry. We cannot read for this purpose "a person attainted of felony" as meaning "a person convicted of felony" capital or non-capital; and the juryman in this case, although he had been convicted of the non-capital felony of receiving, was not attainted, and, therefore, the objection cannot be sustained.

It is right that we should refer to another matter which at one time rather impressed the court: by s. 12 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, outlawry proceedings were abolished, and by s. 20, sub-s. 3, it was provided, " The Acts mentioned in the first and second " columns of sch. IV to this Act are hereby repealed to the " extent specified in the third column of that schedule." Among the repeals is the proviso to s. 1 of the Forfeiture Act, 1870, whereby " nothing in this Act shall affect the law of " forfeiture consequent upon outlawry," and the words in the Juries Act, 1870, s. 10, " nor any man who is under outlawry." At first it seemed as though the fact that Parliament had expressly repealed only the words concerning outlawry might be used as an argument that they intended to leave the rest of s. 10 effective; but as, in the view of this court, a person convicted after the coming into force of the Forfeiture Act, 1870, was not attainted, whether s. 10 is expressly repealed or not, it can have no effect.

In view of the conclusion at which we have arrived on this point, it is, perhaps, unnecessary to consider the argument addressed to us that a person who has served his sentence is to be regarded as having obtained a free pardon. By s. 3 of the Civil Rights of Convicts Act, 1828, it was provided that every punishment for felony, after it had been endured, should have the effect of a pardon under the Great Seal. We feel great doubt whether that section could be prayed in aid in interpreting an Act passed forty-two years later. It seems a more reasonable interpretation that the obtaining of a free pardon contemplated in s. 10 of the Juries Act, 1870, refers to the obtaining of an actual free pardon and not one implied by virtue of the Civil Rights of Convicts Act, 1828, s. 3.

While this is really enough to dispose of the objection, in view of the argument addressed to us we think it right to refer to two more matters. The first is as to the effect of the Juries Act, 1922. Section 1 of that Act contains elaborate provisions for the preparation of the jurors book, and s. 2, sub-s. 1, provides: " Every person whose name is included " in the jurors book as a juror or special juror shall be liable " to serve as such notwithstanding that he may have been " entitled by reason of some disqualification or exemption " to claim that he ought not to be marked in the electors list "as a juror or special juror . . . ." By s. 8, sub-s. 2 (*b*), "A person whose name is not included in the register of "electors shall not be qualified or liable so to serve . . . ."; and there is a provision that a woman who is a vowed member of a religious order or community, although included in the jurors book, shall not be liable to serve.

Although one would not expect a person disqualified, for instance, because he had been convicted of an infamous crime to disclose that fact by claiming that he was disqualified, it seems to us that, as the Juries Act, 1870, imposed a disqualification, whether the person concerned claimed or did not claim exemption does not matter: if his name is included in the jurors book, he is liable to serve. It is true that his name might have been taken out if he had objected; and it is true that his name might not have been included if the registration officer had been aware of his conviction; but it seems to us that the Act provides in terms that a person whose name appears in the jurors' book is liable to serve as a juror, and that that, again, is an answer to the present objection.

There remains always the right of the accused person to challenge either peremptorily or, if he has exhausted his peremptory challenges, for cause. This right remains unaffected; but, it is asked, how could he challenge if he did not know? It is also contended that the cases show that, where information has come to the knowledge of the accused person after conviction with regard to the qualification of a juror, effect has been given to it by the court and the trial treated as a nullity. It is true that there are such cases, but, so far as this court can ascertain, they have all been cases where there has been either impersonation of a juror or a mistake as to the identity of a juror. For instance, in *Rex* v. *Tremearne* (1) on one J. Williams being called to serve, his son, who was not on the panel and was under age and had no qualification, answered for his father and served on the jury. The court, consisting of Abbott C.J., Bayley J., Holroyd J., and Littledale J., held that this was a fatal objection and that there had been a mis-trial; and they made the rule absolute for a new trial.

In *Rex* v. *Sutton* (2), it was sought to obtain a new trial on the ground that an unqualified alien had sat on the jury, which fact was not known to the defendant until after the trial. The only two judges mentioned in the report were Lord Tenderden C.J., and Bayley J., both of whom had been parties to the earlier case. Lord Tenterden said (1): " . . . . " I am not aware that a new trial has ever been granted on the " ground that a juror was liable to be challenged, if the party " had an opportunity of making his challenge. In the case " cited (*Rex* v. *Tremearne* (2)), no such opportunity had been " afforded. We ought to be very careful in giving way to such " an application, for if we must grant a new trial at the instance " of a defendant after conviction, we must, also, do it at the " instance of a prosecutor, when there has been an acquittal; " and it seems to me that, without a precedent, we ought not " to interfere in this late stage of the proceedings." We can see no difference between a case where the disqualification arose from the juryman's being an alien and one in which it arises by reason of his being convicted. The ground of the decision seems to be that there was no doubt as to the identity of the person called, and the prisoner was given his challenges.

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(1) 5 B. &. C. 254.

(2) 8 B. &. C. 417.

In *Reg.* v. *Mellor* (3), there had again been personation, or, rather, a mistake; for, when a man by the name of Thorne was called, one Thorniley by mistake took his place, and it was held by several of the judges to be a mis-trial. As late as 1918 there was before this court *Rex* v. *Wakefield* (4), which, once again, was a case of personation; and, on the authority, among other cases, of *Rex* v. *Tremearne* (2) and *Reg.* v. *Mellor* (4), the court set aside the verdict and ordered a venire de novo. So far as this court has been able to ascertain, this result has only been achieved where there has been personation in one form or another. We can find no case in which, where there has been no doubt as to the identity of the person called, the court has ever set aside the verdict. Our attention was called to *Ras Behari Lal* v. *Regem* (5), a case before the Judicial Committee of the Privy Council, where Lord Atkin certainly indicated that, if the objection to a juror were not known at the time of the trial, but arose afterwards, the court would interfere. It is not, however, necessary for us to go further into that case, which is not technically binding on us, though, of course, we should treat the decision with great respect; for not only are the facts very different from those here, but, for the reasons which we have already given, we are satisfied on other grounds that this objection cannot prevail.

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(1) 8 B. & C. 419.
(2) 5 B. &. C. 254.
(3) Dears. & B. 468.
(4) [1918] 1 K. B. 216.
(5) 50 T. L. R. 1.

It is not without a sense of satisfaction that the court has been able to come to the conclusion which it has reached in this case. While it is no doubt desirable that persons who have real criminal records should not serve on juries, if we had to give effect to this objection it would mean that any juvenile who had been convicted of a petty theft would for the rest of his life be disqualified from serving on a jury; and, whatever may have been the position in the time of Hale C.J., it would indeed be disastrous if we were now obliged to hold that a conviction for a petty crime, technically a felony, conferred disqualification for life on the offender who might have escaped with no more than a nominal penalty. It is worth remembering that, when the Juries Act, 1825, was passed, all but the most petty felonies were capital, so that on conviction and judgment attainder automatically followed. Though the Judgment of Death Act, 1823 (4 Geo. 4, c. 48) empowered the court to abstain from imposing the death penalty on persons convicted of any crime except murder if the offender seemed to the court a fit subject for the exercise of the royal prerogative of mercy, it was not till 1826 that, at the instance of Sir Robert Peel, Parliament began to pass the series of Acts whereby the capital sentence was abolished for nearly all felonies, so that by 1870 it was only treason, murder, piracy by violence, and setting fire to His Majesty's ships and dockyards that remained capital and in which attainder would follow.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

R. P. C.

Reversed.
[1951] 2 K. B. 98

HARLOW v. MINISTER OF TRANSPORT AND OTHERS.

1950
Mar. 8

Birkett J.

Town and country planning—Minister of Transport's closing of highway—Right of user granted to public by Act of 1886*—Existing enactment regulating " development " of land—Meaning—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 12, *sub-s.* 2; *s.* 49, *sub-s.* 1; *s.* 118, *sub-s.* 1.

1950

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By s. 49, sub-s. 1, of the Town and Country Planning Act, 1947, "the Minister of Transport may, if he is satisfied that it is necessary "so to do in order to enable development to be carried out . . . . "by order authorize the stopping up or diversion of any highway." By s. 12, sub-s. 2, "'development' means the carrying out of "building, engineering, mining or other operations in, over or "under land, or the making of any material change in the use of "any buildings or other land." By s. 118, sub-s. 1, the Act of 1947 is to apply "notwithstanding that provision is made "for any enactment in force at the passing of this Act . . . . for "authorizing or regulating any development of the land."

By a local Act of 1886, made under the Enclosure Act, 1845, and by an award made under it, parts of the downs in a rural district, with certain greenways leading across them, were reserved to the public at all times to walk over. The Minister of Transport, purporting to act under the powers conferred on him by s. 49 of the Town and Country Planning Act, 1947, made an order stopping up the greenways. A person aggrieved by the order, moved the court for an order quashing it on the ground that the Minister was not empowered by s. 49, sub-s. 1, to make the order.

Held, that the Act of 1886, in preserving the rights of the public to use the greenways, was not "authorizing or regulating any "development of the land" within the meaning of "development" as defined in s. 12, sub-s. 2, of the Act of 1947, since it was concerned neither with "the carrying out of building, engineering, "mining or other operations in on over or under land" nor with "the making of any material change in the use of any buildings "or other land." Its provisions were consequently not among those overridden by s. 118, sub-s. 1, of the Act of 1947; the Minister was accordingly not empowered by the terms of s. 49 of that Act to stop up the greenways; and his order must therefore be quashed.

MOTION to quash a highway order.

A private Act intituled the Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886, and an award made under it confirmed the terms of a provisional order submitted by the Lands Commissioners for England which contained proposals for the regulation of part of the commons situated in the parish of Totternhoe in the rural district of Luton, Bedfordshire. Among other matters, the provisional order proposed that there "should be reserved "to the inhabitants of Totternhoe and the neighbouring "towns, and the public generally, at all times, a right of "walking over all that part of the said common which is to "be regulated," including inter alia, three greenways known as "The Drovers' Way," "The Wheelbarrow Green Highway," and "The Quarry Green Highway." On November 19, 1949, the Minister of Transport, purporting to act under the powers conferred on him by s. 49, sub-s. 1 of the Town and Country Planning Act, 1947 (1), made an order known as the Stopping up of the Highways (Bedfordshire) (No. 1) Order, 1949, for the stopping up of three highways with which the Act of 1886 was concerned, and for the provision of new highways by the second respondents, Rugby Portland Cement Co., Ld. The applicant, Arthur John Harlow, who represented various soceties concerned with the preservation of rural amenities, and who had been an objector at the local inquiry held by the direction of the Minister of Transport before the order was made, now moved the court, as a person aggrieved by the order, for an order quashing the Order of 1949, on the ground that by reason of the provisions of the Act of 1886 and of the award made under it and duly confirmed, the Minister was without power under the Town and Country Planning Act, 1947, to make an order to stop up the three highways.

Simes K.C. and *Steer* for the applicant. The order of the Minister was ultra vires. His general power under s. 49, sub-s. 1 of the Town and Country Planning Act, 1947, to make an order authorizing the stopping up or diversion of any highway to enable development to be carried out, cannot be exercised in respect of a highway specifically set out by a

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(1) Town and Country Planning Act, 1947, s. 49, sub-s. 1: ". . . . the Minister of Transport may, if he is satisfied that "it is necessary so to do in "order to enable development to "be carried out in accordance "with planning permission "granted under Part III. of this "Act or to be carried out by a "government department, by "order made in accordance with "the provisions of the Sixth "Schedule to this Act authorize "the stopping up or diversion of "any highway."

Section 118, sub-s. 1: "For "the avoidance of doubt it is "hereby declared that the pro-"visions of this Act, and any "restrictions or powers thereby "imposed or conferred in relation "to land, apply and may be "exercised in relation to any "land notwithstanding that pro-"vision is made by any enactment "in force at the passing of this "Act . . . . for authorizing or "regulating any development of "the land."

Section 12, sub-s. 2: "In this "Act, except where the context "otherwise requires, the expres-"sion 'development' means the "carrying out of building, "engineering, mining or other "operations in, on, over or under "land, or the making of any "material change in the use of "any buildings or other land."

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special Act of Parliament for the use of the public. The maxim generalia specialibus non derogant operates to limit the power of the Minister in that respect: see per Earl of Selborne L.C. in *Seward* v. "*Vera Cruz*" (*Owner*) (1); *Rex* v. *Minister of Health, Ex parte Villiers* (2); and per Viscount Haldane in *Blackpool Corporation* v. *Starr Estate Co., Ld.* (3).

The Act of 1886 was a provisional order confirmation Act made under the Enclosure Act, 1845, and regulated the use of the downs in question. It expressly reserved to the public the right to walk over that part of the common, including the greenways in question, which was to be regulated, and it follows that the Minister had no right to stop up the greenways under s. 49, sub-s. 1 of the Act of 1947. Section 13, sub-s. 4 of the Act shows that it was contemplated by the draftsman of the Act that there might be provisions in local Acts preventing development. It is provided by s. 118, sub-s. 1 that the powers conferred on the Minister by the Act may be exercised "in relation to any land . . . . notwithstanding "that provision is made by any enactment in force at the "passing of this Act . . . . for authorizing and regulating "any development of the land." That sub-section applies exclusively to enactments in respect of development, which is defined by s. 12, sub-s. 2 of the Act, as "the carrying out "of building, engineering, mining or other operations in, on, "over or under land, or the making of any material change "in the use of any buildings or other land." Section 118, sub-s. 1, and s. 12, sub-s. 2, must be read together. The provisions which are relied on in the Act of 1886 were not provisions authorizing or regulating development. Section 118, sub-s. 1, therefore, does not apply to the facts of the present case.

Rowe K.C. and *H. L. Parker* for the Minister. Section 49, sub-s. 1, of the Act prima facie entitles the Minister to make the order. If s. 49, sub-s. 1, is read with s. 118, sub-s. 1, the matter becomes clear beyond doubt. If an enactment provides that a piece of land is to be used in a specific way, it is, in effect, providing that that land is not to be used for any other purposes. Such an enactment is clearly an enactment regulating (if not authorizing) the development of land. The Act of 1886 prohibits the use of the downs in any way other than the ways which it prescribes. It is therefore an

(1) (1884) 10 App. Cas. 59, 68.

(2) [1936] 2 K. B. 29.

(3) [1922] 1 A. C. 27, 34.

enactment regulating the development of that land, in part and in whole.

[BIRKETT J. But "development" is defined by s. 12, sub-s. 2, of the Act to mean "the carrying out of building, "engineering, mining or other operations." It cannot cover the right to walk over common land. "Other operations" must be construed ejusdem generis with building, engineering or mining.]

The laying out of a highway is an engineering operation.

Williams K.C. and *W. B. Harris* for the company. We adopt the argument advanced on behalf of the Minister. The definition of development in s. 12, sub-s. 2 of the Act is not limited to operations ejusdem generis with building engineering or mining. The definition also covers "any material change "in the use of . . . . land." The stopping up of a highway is a material change in the use of land; and an enactment such as the Act of 1886 prohibiting such a stopping up is an enactment regulating its development.

As regards Drovers' Way, that was recognized by the Act of 1886 as an ancient road. It did not need the Act of 1886 to preserve it. It was a greenway, being neither metalled nor paved. In so far as the Act of 1886 was passed to keep it in that condition, it must have been an Act regulating development.

BIRKETT J. I quite appreciate that the issue in this case is an important one. On the one hand it is important to the applicant and to the societies which he represents because they desire to preserve the rights granted to them by the Act of 1886. On the other hand, it is equally important to the Ministry of Transport, who may feel that, unless they have rather exceptional powers, their task of planning and development may be impeded and hampered, and that there must be some sacrifice of amenities in the general interests of the development of the land for the benefit of the country.

[His Lordship stated the facts and continued:] It was submitted for the applicant that, on the facts as established, three were no provisions in the Town and Country Planning Act, 1947, which permitted the Minister to make the order of November 19, 1949, having regard to the provisions of the Act of 1886. On the other hand, it was contended for the respondents that the Minister had power to make the order and that in doing so he had properly exercised the power conferred on him by the Act. I do not think it necessary to discuss in great detail the authorities referred to in argument, because the principle for which Mr. Erskine Simes contended on behalf of the applicant is not really challenged. He relied on the speech of the Earl of Selborne L.C., in *Seward* v. "*Vera Cruz*" (*Owner*) (1) in which the following passage occurs: "Now if "anything be certain it is this, that where there are general "words in a later Act capable of reasonable and sensible "application without extending them to subjects specially "dealt with by earlier legislation, you are not to hold that "earlier and special legislation indirectly repealed, altered or "derogated from merely by force of such general words, "without any indication of a particular intention to do so."

In the present instance, Mr. Erskine Simes contended, it is not possible to take the provisions of the Act of 1947 and expunge those which were expressly laid down in 1886. Counsel also referred to *Rex* v. *Minister of Health*; *Ex parte Villiers* (2), and *Garnett* v. *Bradley* (3); but, as I have said, the principle with which they are concerned, namely, generalia specialibus non derogant, was not really disputed. Mr. Erskine Simes said that he relied on the doctrine because there was nothing in the present case to prevent its application, while Mr. Rowe and Mr. Williams said that the doctrine did not apply because in this instance special powers were given in the Act of 1947.

It therefore becomes necessary to consider some of the relevant sections. [His Lordship read s. 49, sub-s. 1, and continued:] It was contended on behalf of the Minister of Transport that that section gave him a general power to authorize the stopping up or diversion of any highway. For my own part, however, I do not think that s. 49 can possibly be read by itself, since there are various other matters which have to be considered with it. If s. 118 is considered in conjunction with s. 49, the power of the Minister is made plain. Section 118 manifestly relates to a power taken by the Minister because of the kind of difficulty which it was foreseen must inevitably arise in very many cases where there was a desire for development, and where, although it was supposed that all the material Acts of Parliament had been complied with, nevertheless the Minister might be frustrated in his purpose by the fact that there might be an enactment in existence which prevented the development considered by him at the material date to be desirable. It has to be remembered, too, that in 1947, conditions were obviously very different from those existing in 1886 or earlier; and it is clear that in s. 118 of the Act of 1947 the Minister had taken power in the special circumstances there set out to endeavour to get rid of a frustrating element in the shape of a prior enactment which might stand in his way, by the use of the words: " . . . . notwithstanding that provision is made by any enactment in force at the passing of this Act . . . . for authorizing or regulating any development of the land."

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(1) 10 App. Cas. 59, 68.

(2) [1936] 2 K. B. 29.

(3) (1878) 3 App. Cas. 944, 968.

The word "development" is the important word, and it is defined in s. 12, sub-s. 2, as meaning "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land." With that definition incorporated in it, s. 118 would read: " . . . . may be exercised in relation to any land, notwithstanding that provision is made by any enactment in force at the passing of this Act for authorizing or regulating any carrying out of building, engineering, mining operations in, on, over or under land, or the making any material change in the use of any buildings or other land."

Section 13, which also concerns the development of land, was referred to by Mr. Simes, but I do not think that it is of much assistance in the present matter.

In the result the argument before me came to this: Mr. Simes submitted that the Act of 1886 could not, on the authorities, be overridden by a later Act, and, in particular, that it could not be overridden by s. 118 of the Act of 1947, because, on the facts of this case, neither the provisional order made in 1886, nor the award made under it was concerned with authorizing or regulating any development of the land within the meaning of s. 12 of the Act of 1947; and that consequently the Minister had no power to make the order which he purported to make.

On the other hand, counsel for the respondents contended that the Act of 1886 authorized and regulated development within the meaning of s. 118; and in support of that contention they referred to the Commons Act, 1876. It was, however, agreed that the real question which I have to decide is whether what took place in 1886 was a development of the land within the meaning of s. 118 of the Act of 1947. I have come to the conclusion that the order of the Minister closing these highways ought not to have been made. I am satisfied that the meaning of "development" in s. 118, as defined in s. 12, must be adhered to closely, and I cannot think that the "development" which took place under the Act of 1886 was in any sense the "carrying out of building, engineering, "mining or other operations in, on, over or under land" which is the first head of the definition, or that, under the second head, it amounted to "the making of any material "change in the use of the land" in question.

On the evidence before me it would not appear that any material change, or in fact any change at all, had been made in the three highways specified in the Minister's order which would constitute development within the meaning of "development" as defined in s. 12. All that the Act of 1886 professed to do was to preserve the ancient roads and tracks specified in their existing condition and to reserve to the local inhabitants and the public generally, at all times, a right of walking over all that part of the common which was to be regulated.

Mr. Simes contended that those provisions did not amount to "development" within the meaning of s. 118 and s. 12, but merely provided for the maintenance of the existing use of the particular land with which I am concerned, although it might be that there was some development of other parts of the common. With that view I agree, and in those circumstances I think that this motion, which asks that the Minister's order may be quashed in that it was not within the powers given to him by the Act of 1947, must succeed; and I shall order an award on the motion that the order of the Minister be quashed.

Highway order quashed.

Solicitors: *Dixon & Co., for Dixon, Martell & Co., Luton Treasury Solicitor; Braby and Waller, for M. K. Smith, Rugby.*

P. B. D.

AMALGAMATED RELAYS LD. *v.* BURNLEY RATING AUTHORITY AND OTHERS.

1950
Jan. 12.

Lord Goddard C.J., Lynskey and Sellers JJ.

Rating—Valuation—Wireless relay service—Wires for relay—Profits basis.

A company carried on the business of wireless relay service within a county borough. The service was the only one of the kind in the county borough, and consisted of a receiving station and seven sub-amplifying stations from which programmes broadcast by the B.B.C. were transmitted, over a system of wires and at a fixed weekly charge, to private subscribers. The wires were carried to the subscribers' premises from these sub-stations by means of brackets attached to the walls or chimneys of dwelling-houses or buildings. The company had approximately 10,000 subscribers at 1*s.* 3*d.* a week and 2,500 at 1*s* 0*d.* a week. The rating authority proposed that the rateable value of the relaying wires should be increased from 924*l.* to 6,000*l.* This proposal was accepted by the area assessment committee as correct, and the rateable value of the wires was fixed at that figure. The company appealed to quarter sessions. The recorder upheld the assessment, deciding that the wires were properly valued on the profits basis and not on the contractor's basis. On appeal by the company to the Divisional Court,

Held, that, as either the profits basis or the contractor's basis could be applied to the case, it was a question of fact for quarter sessions which of them ought to be applied; that the recorder had taken into account proper considerations; and that he had made no error in law in deciding that the profits which the undertaking earned were the best test of the rent which a hypothetical tenant would be prepared to pay for the wires and, therefore, of their rateable value.

CASE STATED by the Recorder of Burnley.

The appellants, Amalgamated Relays Ld., appealed to Burnley Quarter Sessions from a determination dated May 11, 1948, of Burnley Area Assessment Committee.

On the hearing of the appeal to quarter sessions the following facts were proved or admitted. The company held a licence from the Postmaster-General to provide a wireless relay service within the county borough of Burnley. The licence expired on December 31, 1949, or at the will of the Postmaster-General. By an agreement dated May 20, 1937, the corporation of Burnley consented under s. 25 of the Public Health Act, 1925, to the company's fixing and placing wires in connexion with their wireless relay service over, along or across streets within the county borough. The service was the only relay service in the county borough and was wholly within it. The service consisted of a receiving station at Standish Street, Burnley, to which, by private telegraph wire rented from the Postmaster-General, programmes of the British Broadcasting Corporation were transmitted, those being amplified and re-transmitted to seven sub-amplifying stations. From those stations the programmes were relayed by wires, the property of the company, to individual subscribers in each sub-amplifying area. The wires for relay were carried overhead by means of poles in some cases, but more usually by means of brackets attached to walls and chimney stacks of dwelling-houses and other buildings. They constituted a direct connexion between the sub-amplifying station and the premises of each subscriber. With the exception of two road crossings, no wires for relay were carried underground. The company did not provide loud-speakers for use in connexion with the wires for relay and they fixed their wires in that part of the subscriber's premises where he desired to have the loud-speaker. When a new subscriber desired the service offered by the company, it was not necessary to provide a wire direct from the sub-amplifying station to the premises of the new subscriber, but an existing wire near his premises was " tapped " and a wire was run from the already existing wire for relay to the premises of the new subscriber. The company offered two services to subscribers. Some subscribers paid 1*s*. 3*d*. a week and had a choice of two programmes relayed by the company. Others paid 1*s*. a week and had no choice of programme. On January 1, 1948, the company had 10,085 subscribers paying 1*s*. 3*d*. a week and 2,447 paying 1*s*. a week.

On March 24, 1948, the respondents, Burnley rating authority, made a proposal that the rateable value of the wires for relay should be increased from 924*l*. to 6,000*l*., the parts of the wireless relay service other than the wires for relay being separately assessed. The sub-amplifying stations were rented to the company at consolidated rents which included rates.

On May 11, 1948, the assessment committee accepted the contention of the rating authority that the method of assessment commonly known as " the profits basis " was the correct one. They accordingly fixed the rateable value at 6,000*l*. It was admitted before the recorder on the one hand that the wires for relay were rateable, and that if the method of assessment commonly known as " the profits basis " were the correct method of assessment, 6,000*l*. would be the correct rateable value; and, on the other hand, that, if the correct method of assessment were that commonly known as the "contractor's basis," 40,000*l*. would be a correct figure of capital value on which to take 5 per cent. a year for the purpose of arriving at the correct rateable value.

It was contended for the company that "the profits basis" was the wrong basis of assessment and the "contractor's "basis" the correct one.

For the assessment committee and the rating authority it was contended that "the profits basis" was a lawful and proper one for arriving at the rateable value, and was in fact the best method of ascertaining it. The recorder held that for this type of hereditament "the profits basis" was the proper and lawful basis of assessment to be adopted. As no other figure than 6,000*l*. in relation to "the profits "basis" was put forward for his consideration, he found that that sum was a proper value and rightly inserted in the valuation list. He accordingly dismissed the appeal.

In the course of his judgment the recorder said: I have, as a first approach to this case, considered the nature of the hereditament which is under consideration. It is one which substantially consists of wires for relay and supports therefor. It does not fit into the category of the overwhelmingly normal type of hereditament which is represented by a house, shop, factory or warehouse, to take only four examples. Moreover, it is probable that the vast majority of overhead and underground wires in this country are vested in the Postmaster-General and are rated by special enactments: see for example, Ryde (8th ed.) para. 138, at p. 146. I have come to the conclusion that wires hung and utilized, as in this case, are, whilst a species of the genus hereditament, in a very special category of their own, and must be treated with a somewhat different approach from the methods one would apply in the case of what I have termed "the normal type of "hereditament."

The system of relay wires under review serves a congested urban area. I ask myself how, if I were to adopt the "con-"tractor's basis" of assessment, I could reconcile the result of adopting such a basis with the results it would provide for a similar capital expenditure in a rural area, or an area partly urban and partly rural. It might well be that the gross revenue from a successful exploitation of either or both of the two latter-mentioned types of area would be in excess of

5 per cent. on the capital involved, but it would in common sense clearly be less than the gross revenue to be derived from a successful exploitation of the first-mentioned type of area. I cannot bring myself to think that a hypothetical tenant would pay (assuming I accept the "contractor's basis" and adopt for arithmetical purposes the figure of 40,000*l*. and the percentage of 5) the sum of 2,000*l*. a year impartially for each and every one of the three types of area which I have mentioned and do this without consideration of any other factor.

In considering the applicability of the "contractor's basis" I do not find myself assisted in the instant case by a consideration of gas works or water works or such forms of undertaking or enterprise as steel works to which this basis has been applied. The differences involved are obvious and profound. I am not able to seek the advantage of comparison with comparable hereditaments. There are ex concessis none.

I ask myself what would be the factors which the hypothetical tenant would take into account in what has been termed "the higgling of the market" if this hereditament were on offer for the purpose of letting from year to year. In my view, he would want to know what capital was involved, what profits were made, the number of subscribers, the progress of the concern in acquiring subscribers, and the number of potential installations in the area served, which last factor would indicate the possibilities of expansion. The hypothetical tenant would also, I think, inquire into the condition of the plant and correlative thereto make some inquiry into the satisfaction or otherwise of the subscribers, though perhaps the answer to these two last questions would be found by a comparison of the figures of profits over a few years. If, then, the hypothetical tenant were asked to pay as a yearly rent the figure of 6,000*l*. which it is agreed shall for the purposes of this case be taken as the "profits basis" figures, is it likely, as Mr. Williams suggested, that he would refuse because he felt that he could himself expend 40,000*l*., the agreed "contractor's basis" figure, and earn at an annual charge thereon of only 2,000*l*. a gross revenue adequately comparable to the 6,000*l*. figure? I do not think this is a reasonable assumption to make. There is to my mind no comparison with a house, or a factory, or a warehouse, or, indeed, any other type of hereditament. The wireless relay system is the supply of something produced aliunde. It will inevitably be the same programme which is relayed whosoever relays it: the same type of wires, the same or a similar method of relay, is available; and the same or a similar method of installation in the home of the subscriber. The fundamental thing supplied is the programme, which is identical whatever number of companies supply it. It therefore seems to me in the highest degree improbable that in the haggling to secure a rental from a potential hypothetical tenant the threat to go away and use 40,000*l.*, or any sum, to erect a competing apparatus would be regarded on either hand as a threat susceptible of procuring a reduction of the rent asked.

Giving the best consideration I can to all the factors which have been put before me, and those which I have suggested to myself, I consider that for this type of hereditament the "profits basis" is the proper and lawful basis of assessment to be adopted, and I so find and adjudge.

H. B. Williams K.C. and *J. Booth* for the company. The profits basis came into existence in order to enable those considering certain types of property to arrive at a fair basis upon which they could base the rent a hypothetical tenant would pay for the property. In recent years this method of assessment has been extended beyond the classes of property to which it was formerly limited, and has been applied in the case of racecourses and public houses. The hereditaments to which this method is applied are usually of a monopolistic character, and the hypothetical landlord is invariably in a very strong position. It cannot be said that a monopoly exists or ever did exist in this hereditament; there is no restriction of this service to these wires. Here the company obtained a licence from the Postmaster-General to carry on a wireless relay service which related to the whole enterprise in Burnley. In addition consent was given by the local authority (s. 25 Public Health Act, 1925) for placing wires over the street, and such consent must be given when a proper application is made. It is essential that monopoly attaches to either the landlord or the hereditament to justify assessing on the profits basis. If the assessment were made in respect of the whole enterprise it might be appreciated how the valuation was arrived at, but it is the wires only that were rated on the profits basis. This is a perfectly simple hereditament where any element of monopoly is entirely absent, and methods other than the profits basis would give a fair result, for example, the contractor's basis. The same method of assessment must be applied in both town and country. [They referred to *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1).]

Rowe K.C. and *Glidewell* for the assessment committee and the rating authority. If it be open to the recorder to consider a valuation when profits are relevant, then it is a question of fact only. The profits basis is a strict formula for public utility undertakings. It cannot be said that the profits basis used here was strictly in accordance with the formula applied to water boards or companies. It was based simply on an estimated profit. Consideration of profits is a relevant matter in law, and the recorder looked at both profits basis and contractor's basis, and he rejected the latter. With the usual type of hereditament, one must look outside it and consider whether profitability is a factor that would influence the mind of the hypothetical tenant ; if so, the profits must be considered and the question becomes one of degree, which is a matter of fact. The real question is whether it is legitimate to look at profitableness ; if so, then that is a matter of law ; but, where it is merely a question between the contractor's basis and the profits basis, then it is a question of fact. It is agreed that as a matter of law, we can look at profits to decrease the value ; then surely that principle may be applied to an increase. [They referred to Ryde on Rating, (8th ed.) p. 258.] If the hereditament is not a monopoly, then it is specially suitable to the profits-basis assessment : *Surrey Valuation Committee* v. *Chessington Zoo Ld.* (2). It cannot be said that the contractor's basis is wrong, or that the profits basis is right ; but the recorder was entitled to look at profits, and his conclusion was right in law.

H. B. Williams K.C. replied.

LORD GODDARD C.J. The company's relay system, these wires, had previously been rated or assessed at the sum of 924*l.* The rating authority made a proposal increasing that rateable value to 6,000*l.*, certainly a startling increase, as startling indeed as in the recent case before this court, *Surrey Valuation Committee* v. *Chessington Zoo Ld.* (2), which has some bearing upon this case.

The recorder, in the course of a careful judgment, has told us exactly how he came to approve of that increase and therefore to dismiss the appeal subject to the case which he stated

(1) [1926] A. C. 331, 338.

(2) [1950] 1 K. B. 640.

for the opinion of this court. The figures were agreed to this extent between the parties: if the assessment were to be based upon profits which were earned by the company, the figure of 6,000*l.* would stand because the amount of profits was not disputed. If, however, the contractor's basis or contractor's theory, as I think it is generally called, were to be adopted, then the figure would be 2,000*l.* This court is therefore not concerned with any question of figures, nor is it suggested that any other basis is to be taken than the profits basis or the contractor's basis.

A certain confusion has crept into the case, in exactly the same way as it did in the *Chessington* case (1), through the use of the expression "the" profits basis. As I pointed out there, where there are exceptional hereditaments, that is to say, hereditaments not of the ordinary class such as houses, factories, shops or warehouses, which could always be compared with others, rating surveyors have to find some formula, theory, or basis by which a rent can be calculated for that hereditament which is not in fact let at a rent and probably never would be. Among the different formulae which have been devised from time to time is one which is applicable to public utility undertakings. It is based to a great extent on profits, but is an elaborate formula into which I shall not go in detail. That formula has come to be known as the profits basis, but it is not a formula which takes into account nothing but profits.

It has always been the law, as I understand it, that, in any of these cases relating to hereditaments which are not of the ordinary class, the court can look at profits. Both in this and in the *Chessington Zoo* case (1), because profits were the only thing which the court thought enabled it to fix a rent, it was said that it was fixed on "the" profits basis. If they had said "a" profits basis, that would have been better, because it is clear that the sort of formula that was approved in the leading case, *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (2), has not been adopted here.

What the recorder has taken into account is this: he has said: "Here is a profit-earning system; what is it likely "that a tenant would pay if this system were let to him at "a rent?" In considering what a tenant would pay, the court has also to consider what a landlord would take, for in fixing the rent it is necessary to have regard to what is often called "the higgling of the market." That depends on the

(1) [1950] 1 K. B. 640.

(2) [1926] A. C. 331, 338.

landlord's willingness to accept a certain sum, as well as on the tenant's willingness to pay it.

Here, it may be, there is not, technically or legally, a monopoly; but there is an elaborate system of wires which can be used and are being used for the diffusion of wireless programmes all over Burnley. As a matter of history, it seems that there were various companies supplying this service in different parts of Burnley, and that they have now amalgamated. Therefore there is one system. It may be, and certainly the recorder could take that into account, that it would be unlikely, though, perhaps, not impossible, that, as long as this company is operating in Burnley and supplying this service, the corporation would allow still further wires to be put up by any other company. At any rate, the position at the present moment is that the company can say to any intending tenant, if it were minded to let at a rent, that it had a system which was working; that nobody else had it; that it was unlikely that any competitor would come into the market; and that at any rate there was no competitor in the market. Therefore there is nothing from what is being obtained from comparable hereditaments to show what a tenant would be likely to pay. The landlord would be in a position to say that if he let to the prospective tenant he would be putting him into a position in which he could make substantial profits and that he, the landlord, wanted a share of them. What share he would demand and what share the tenant would be willing to pay is a question of fact which the tribunal of fact must assess in the best way it can.

Mr. Williams contended that that is a wrong method and one not allowed by law, and that the contractor's method or theory is that which ought to be applied. A conclusive answer, I think, is that the contractor's method, again, is only applicable to cases where there is a special class of hereditament which is not, and is unlikely to be, let at a rent and where there are no other hereditaments which are being let at a rent with which it can be compared.

It seems to me, therefore, that we are thrown back to this position: it has been held in many of the cases—I need not again cite them, as I did so in the *Chessington Zoo* case (1)—that it is legitimate to look at the profits in considering what rent would be paid. It is also, no doubt, legitimate to take the contractor's method, which is to take the cost of the building

(1) [1950] 1 K. B. 640.

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Lord Goddard C.J.

of the hereditament and the value of the land upon which it is built, and to take a percentage as the return which a contractor would probably be content with, four or five per cent. At the present moment, with the varying values of money and the additional expense of building, the contractor would want some different terms perhaps; but at any rate some figure must be reached which a contractor would accept. But if it is legitimate to look at the profits and also legitimate to look at the building cost and the return which a tenant would require, it seems to me that it remains a question of fact for the court as to which of the two methods is the likely one to yield the true rent. It may be, as it worked out in this case, unfortunate for the ratepayer that the method which the court has taken as the one most likely to yield a true rent works against him because it requires him to pay a higher rent than he would have paid if the contractor's method had been adopted. On the other hand, it might well be, in another case, where the tenant was making a very small profit, that the contractor's method might work out very much against the ratepayer.

I can only say that I think that to look at the profits was legitimate, and that the recorder cannot be said to have gone wrong in so doing. If he found that that method was the only method, or the best method, to show him what the rent ought to be, I cannot say that he ought to have adopted some other method. There are many reasons, some of which he sets out in his judgment, why he thinks that the contractor's method is not the best. That seems to me entirely a question of fact. As he has come to the conclusion that the profits which can be earned by this system afford the best test of what a tenant would be willing to pay, the figures being on that basis agreed, I can see no ground for saying that he has gone wrong in law. It accordingly follows that the appeal fails.

LYNSKEY J. I agree. In the course of the argument I was reluctant to be convinced that the recorder was right in his decision, because if, by adopting one of two recognized methods of assessing the annual value, the result were an annual value of 2,000*l.* and by adopting the other it were 6,000*l.*, I should have preferred in the interests of the ratepayer to adopt the method which would have given the lower valuation. In fact, we are concerned with fictitious circumstances—with a hereditament consisting of wires only, which is never likely to be let as a separate hereditament and for which no rent will ever be paid; nor, probably, will any negotiations for any separate letting apart from the whole undertaking ever be initiated.

It seems to me that the recorder posed to himself the right question when he said: " I have to ask myself what rent " would the hypothetical tenant of the premises from year to " year in this case be reasonably willing to pay therefor. " I am entitled to take into account all possible tenants, including the actual occupier, the company here. I am entitled " to take into account all things that would reasonably affect " the mind of the intending tenant."

In my view that is undoubtedly the correct question which he had to put to himself and to answer. He considered two methods, and only two methods, which were put before him, the contractor's method and " the profits basis," which, with the Lord Chief Justice, I prefer to call " a " profits basis. Having considered both these methods of arriving at the annual value of these particular hereditaments, the recorder has taken the view that the contractor's method would not give him a true picture of the annual value. His reasons were that this system is already in existence; that would be necessary to get licences and permits to introduce a competing system; and that, even with a competing system, the position would be that the competitor could only supply exactly the same article in exactly the same way as that in which the existing system was supplying it. In those circumstances, having investigated the facts, he thinks that the contractor's method would not give a true picture of the annual value. One must take into account, he says, as a possible hypothetical tenant, the existing occupier, the company here; and any other hypothetical tenant would have to be in the same position, and wave his stations for receiving, and his sub-stations for rediffusion, and desire to acquire the letting of these wires. Considering the number of people who are using this system and that there is a turnover of 39,000*l.* odd a year, it seems to me impossible to say that the recorder has come to a wrong conclusion either in fact or in law in holding that the contractor's method is not the correct one to apply.

In those circumstances it seems to me not open to this court to say that, in having regard to profits or adopting a profits method, the recorder has gone wrong in law. Accordingly, although with some reluctance, I agree that this court cannot interfere and that the appeal should be dismissed.

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SELLERS J. I agree. The recorder, in his judgment, said : " I have come to the conclusion that wires hung and " utilized, as in this case, are, whilst a species of the genus " hereditament, in a very special category of their own, and " must be treated with a somewhat different approach from " the methods one would apply in the case of what I have " termed ' the normal type of hereditament.' " That was, I think, accepted by the parties in front of him.

Two contending views were put before him, and only two, either what is described as " the profits basis," or the " contractor's basis." The recorder applied his mind to both and came to the conclusion that the " contractor's basis " was not appropriate in making a fair assessment of what a hypothetical tenant would pay for the premises. He said : " It therefore seems to me in the highest degree improbable " that in the haggling to secure a rental from a potential " hypothetical tenant the threat to go away and use 40,000*l.*, " or any sum to erect a competing apparatus, would be regarded " on either hand as a threat susceptible of procuring a reduction " of the rent asked." For the reasons given by my brethren, I can see no reason for saying that he was wrong in law in applying " the profits basis." Indeed, on the whole it seems to me that it does in the circumstances of this particular case arrive at a truer assessment than would the other basis, with all the restrictions and obstacles in the way and with a hereditament which has been described, if not as a monopoly, at any rate as one having monopolistic tendencies. I think that essential ingredient justifies the recorder in applying the basis that he did, and I agree with the order proposed.

Appeal dismissed.

Solicitors : *Bentleys, Stokes & Lowless, for H. G. W. Cooper, Burnley ; Sharpe, Pritchard & Co., for the Town Clerk, Burnley.*

L. F. J. McD.

C. A.

STAG LINE LD. *v.* BOARD OF TRADE.

1950
Apr. 27, 28.

Lord Oaksey, Cohen and Singleton L.JJ.

Shipping—Charter-party—Construction—Vessel to load at " one or two " safe ports East Canada . . . . place or places as ordered by " charterers and/or shippers "—Demurrage—When an arrived ship —Meaning of " place or places."

The plaintiffs' steamship was chartered by the Board of Trade " to proceed to one or two safe ports East Canada or Newfoundland, " place or places as ordered by charterers and/or shippers . . . . " and there load . . . . a full and complete cargo of pit props." The charterers nominated Miramichi as the loading port, and, on arriving at that port on August 6, 1947, the ship gave notice to the shippers of her arrival and readiness to load. She was then ordered by the charterer's agents to load at Millbank, one of the four loading places in the port. There was not at that time a berth available at Millbank, and she was unable to begin loading until August 12. The shipowners claimed six days' demurrage.

Held, that, as by the charter-party the charterers and/or shippers were given an express right to order the vessel, on reaching the nominated port, to load at a particular place within the port, the ship was not an arrived ship until she berthed at Millbank and no demurrage was recoverable.

Decision of Devlin J. [1950] 1 K. B. 536, affirmed.

Appeal from Devlin J. (1).

By a charter-party dated July 17, 1947, the plaintiffs' steamship *Cydonia* was chartered by the Board of Trade " to proceed to one or two safe ports East Canada or Newfound- " land, place or places as ordered by charterers and/or " shippers, or so near thereunto as she may safely get, and " there load, always afloat, or safely aground where ships of " similar size and draught are accustomed to load aground " in safety, from the agents of the said charterers, a full and " complete cargo of pit props." The charterers nominated as the loading port Miramichi, a port at the mouth of a river running into the St. Lawrence. The *Cydonia* arrived in the port on August 6, and gave notice of her readiness to load, but was then ordered by the agents of the charterers to go to Millbank, one of the four loading berths within the port. There was not at that time a berth available at Millbank, and it was not until August 12 that the vessel was able to begin loading. The plaintiff shipowners claimed six days' demurrage on the ground that the *Cydonia* was an " arrived " ship when she reached the nominated port, so that lay days began on August 6.

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(1) [1950] 1 K. B. 536.

Devlin J. dismissed the action, and the shipowners appealed.

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Board of Trade.

Mocatta for the shipowners.

E. W. Roskill for the charterers.

The arguments were directed to the construction of cl. 1 of the charter-party and sufficiently appear from the judgments.

Lord Oaksey. This is an appeal from a judgment of Devlin J., sitting in the Commercial Court, on a claim made by the owners of the *Cydonia* for the sum of 863*l*. 3*s*. 6*d*. in respect of demurrage. The matter turns almost entirely on the construction of the charter-party, and it is common ground that the law applicable is settled. The principle of it is stated by Devlin J. in his judgment in these words: "If the berth at which the vessel ultimately has to load or "discharge is named in the charter-party, she is not an "'arrived' ship until she arrives at the berth and by 'named "'in the charter-party' I mean either named in it when "originally drafted or named in it by virtue of a power of "nomination expressly given by the charter-party. If, on "the other hand, there is no power of nomination expressly "given, so that no berth is named therein, and she proceeds "to the berth ordered by the charterers merely by virtue of "the implied right which the charterers have to select the "loading berth, then she becomes an 'arrived' ship when "she arrives at the place then named in the charter-party, "which is the port." The principle being well establsihed, the question is whether under this charter-party the charterers or the shippers had an express power to nominate the berth at which the vessel should be loaded.

The matter turns principally on cl. 1 of the charter-party, which, omitting immaterial words, states: "That the said "vessel, being tight, staunch and strong, and in every way "fitted for the voyage, shall . . . . sail and proceed to one "or two safe ports, East Canada or Newfoundland, place or "places as ordered by charterers and/or shippers, or so near "thereunto as she may safely get, and there load, always "afloat, or safely aground where ships of similar size and "draught are accustomed to load aground in safety, from the "agents of the said charterers, a full and complete cargo of "pitprops not exceeding 10-feet lengths, option up to 5 per

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"cent. maximum 13 feet. Up to three berths Miramichi "district to count as one port." For present purposes, that is the most material clause in the charter-party.

It is contended on behalf of the charterers that the words "place or places as ordered by the charterers and/or shippers" conferred upon them an express power to nominate the berth or berths at which the ship should load. It is, on the other hand, contended on behalf of the shipowners that there was no such express power conferred by those words; that the power of the charterers to indicate where the vessel was to load was not that contended for by the charterers; and that in the circumstances they were entitled to the demurrage claimed.

Devlin J., in his judgment gave two principal reasons for deciding the matter in favour of the charterers. He said that the argument of the shipowners necessitated altering the arrangement of these words in cl. 1 of the charter-party, and reading it as though the words were: ". . . . proceed "to one or two safe ports, place or places, East Canada or "Newfoundland, as ordered by charterers and/or shippers," and he relied on the fact that that involved the transposition of the words of the clause. He also drew attention to the fact that it disregarded the comma which occurs before the words "place or places as ordered." He also relied—(and I think that this is the other main point in his judgment)—on the consideration that, if that had been the intention of the parties, it would have been a very simple thing to put the words of the clause in that order.

I agree with Devlin J. I think that it is important to remember the settled principle of law in reference to the express power given to the charterers to nominate the berths at which the ship should lie. In the light of that principle of law, I think it a very much better construction to read these words as giving an express power to the charterers, and to the charterers alone. I think that the position of these words in the clause is the crucial point in the case: as Devlin J. said in his judgment, what the parties were endeavouring to say was that the ship might proceed to one or two safe ports in East Canada or Newfoundland, and that then, within those ports, the charterers would order the place or places to which the vessel was to go.

The argument on the other side was that the words "as ordered by charterers and/or shippers" appear to qualify

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the words "one or two safe ports, East Canada or Newfound-"land" and "place or places." In my view (as Cohen L.J. pointed out in the course of the argument, and as Mr. Roskill submitted to us), the power to nominate the ports to which the vessel should go was expressly conferred by cl. 39 upon the charterers, and upon the charterers alone—not upon the shippers. That, in my opinion, supports the view that the words "as ordered by charterers and/or shippers" were not intended to apply to the words "one or two safe ports, East "Canada or Newfoundland." It seems to me also that the words "place or places as ordered by charterers and/or "shippers," in the position which they occupy in the clause, must really refer to the berths, or points, or spots, at which the ship could load, because they are not in any way qualified, unless by the words "place or places" within the ports, as to their locality. They might refer to any port in the world, unless they are a "place," or "places" within the ports that are specified in the phrase which goes before.

Then it is argued on behalf of the shipowners that the last words of cl. 1 are significant in their favour, because they say: "Up to three berths Miramichi district to count as one port." Mr. Mocatta says that that indicates the difference which was intended between the words "place or places" and the word "berths." I think it a good answer to that to say that the "place" or "places" in which the ship might load would not necessarily be properly described as "berths": they might be spots, or points, or they might be in the open water. Therefore, "place or places" is a generic term which may have been used to indicate the sort of place in which the ship might load—places which are actual loading spots, or points, within a port.

For all these reasons, I think that the judgment of Devlin J. was right, and that this appeal should be dismissed.

Cohen L.J. I can quite shortly state my reasons for agreeing that this appeal should be dismissed. It seems to me that one should do as little violence as possible to the wording of a commercial document, in order to arrive at a sensible construction of its provisions. I agree with Devlin J. that the construction of the words of cl. 1 of the charter-party submitted by Mr. Roskill is that which best conforms to the language which the parties to it have chosen to use. Mr. Roskill's construction involves only the insertion of an addi-

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tional comma after the words "and/or shippers," whereas, at the conclusion of his argument in reply, Mr. Mocatta was compelled to admit that the minimum alteration which he could make in order that the clause should read in the sense which he desired was to transpose the words "East Canada or "Newfoundland" to follow the words "proceed to" and to make the clause read: ". . . . proceed to East Canada or "Newfoundland one or two safe ports, place or places as "ordered by charterers and/or shippers." I do not see any reason for doing that violence to the language of the clause. As my Lord has pointed out, if the words "place or places as "ordered by the charterers and/or shippers" be merely read as if they were in inverted commas, the clause would enable the charterers and/or shippers to nominate the actual berth or point at which the loading should take place, and very little violence would be done to the language of the clause; nor would anything be omitted which was not covered by some other clause of the charter-party. Mr. Mocatta argues that to make sense of the clause the words "as ordered by the "charterers and/or shippers" must govern the words "one "or two safe ports." I think that it is quite unnecessary to make that change, because the question of nominating the actual port or ports is fully covered by cl. 39.

My Lord has dealt with the argument based on the words, "Up to three berths Miramichi district to count as one port," and I do not desire to add anything to what he has said as to that.

The only other point to which I wish to refer is in regard to cl. 29, which provides: "When loading in Newfoundland, "ship to give free use of accommodation as on board for carrying "measurers and/or workmen between loading places and for "two measurers while loading." Mr. Mocatta asks us to say that that shows that where the draftsman uses the word "places" he means "ports" and not "berths." I see no reason for so limiting the meaning of the word. We are not concerned here with the question of nomination: all that is provided for here is free accommodation for carrying measurers and/or workmen between such "loading places" (which I should read as "berths") as the ship may visit, in accordance with the directions given under other clauses of the charter-party. It seems to me that there is nothing inconsistent in that clause with the view that the words "place or "places as ordered by charterers and/or shippers" in cl. 1

mean the loading points, or loading berths, which the charterers and/or shippers may nominate.

For these reasons I think that the charter-party does contain a provision conferring upon the charterers the express right to nominate the actual berth, and, if that be its true construction, there is no dispute but that the judge's decision was right.

SINGLETON L.J. I agree.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan*; *Treasury Solicitor.*

A. W. G.

PARMEE *v.* MITCHELL.

[Plaint No. E. 2269]

C. A.
1950
Mar. 17.

Evershed M.R., Somervell and Jenkins L.JJ.

Landlord and tenant—Rent restriction—Sub-tenant of part of premises—Purchase of whole—Notice to tenant—Whether offer of part of premises occupied by tenant suitable alternative accommodation—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 (*b*).

The defendant had for many years been tenant of the whole of a dwelling-house within the protection of the Rent Restriction Acts. He sublet the upper part of the premises to the plaintiff, reserving for his own use the lower part. Subsequently, the plaintiff purchased the house and on October 24, 1949, as landlord, served notice to quit on the tenant in respect of the whole of the premises. The landlord offered to the tenant as suitable alternative accommodation the lower part of the premises which he had been occupying on the date of the service of the notice to quit. The county court judge ordered the tenant to give the landlord possession of the whole property, and he further directed that the operation of the order should be subject to the landlord's granting as alternative accommodation the part of the house already occupied by the tenant.

Held, that the landlord had rightly claimed possession of the whole premises, since it was only in that way that he could determine the tenant's interest; that the alternative accommodation offered to the tenant was not the identical premises of which the tenant was in law in possession but merely the part of which he was in actual physical occupation; that that part represented the only part of the premises necessary to provide the accommodation which he wanted; that the lower part of the premises could therefore properly be regarded as alternative accommodation, although it was part of the entire house of which the tenant was in possession; and that the right order in the circumstances was that the landlord was entitled to possession of the whole premises, subject to a proviso that the tenant was to be entitled to remain in occupation of the lower part of the premises as a weekly tenant of the landlord at the weekly rent which had been fixed.

Thompson v. *Rolls* [1926] 2 K. B. 426, followed.

APPEAL from West London county court.

The defendant, Edwin Mitchell, had been tenant of No. 19 Ackmar Road, London, a dwelling house within the Rent Restriction Acts, for a number of years. In 1946 he sublet the upper part of the house to the plaintiff, Frederick Parmee, retaining for his own use the lower part of the premises. The plaintiff purchased the whole house, and on October 24, 1949, he served notice to quit on the tenant in respect of the whole premises. The county court judge ordered the tenant to give to the landlord possession of the property, and further directed that the operation of the order should be subject to the landlord's granting as alternative accommodation a lease of the part of the premises already occupied by the tenant. The tenant appealed.

Christopher Hodson for the tenant. The order which the county court judge made is wrong. Premises which are in fact in the occupation of a tenant cannot be suitable alternative accommodation within s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The tenant's principle objection to the order which has been made is that the landlord's rights will be increased as a result of his purchase of these premises, and that the tenant's rights in respect of the portion of the premises not in his actual occupation will be destroyed. If an order is made, the right of the tenant to recover possession of the part of the premises which he has sublet to the landlord will be lost. This case is distinguishable from *Thompson* v. *Rolls*(1): there the tenant was in possession of the whole of the premises; here he is only in possession of a part. An order directing the tenant to deliver up possession of the whole of the premises should not have been made, as it appears on the face of the order that there is in fact to be no actual transfer of possession.

R. B. Willis for the landlord. The tenant was originally the contractual tenant of the whole of this dwelling house. The landlord wants to get rid of the statutory tenancy of the whole house in order that he may not remain sub-tenant of his own property. The landlord was right in asking for an order for possession of the whole house. It was only in that way that he could determine the statutory tenancy.

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(1) [1926] 2 K. B. 426.

JENKINS L.J. The landlord's case is put in this way: it is said that the tenant by himself or his tenant, the landlord, is in possession of the whole of the premises. It is said that the part of those premises, namely, the lower part, now in the actual occupation of the tenant, constitutes suitable alternative accommodation, and it is contended therefore that, subject to the court's considering it reasonable to make the order, the case is one in which an order for possession can properly be made under s. 3, sub-s. 1 (*b*) of the Act of 1933.

The propriety of the order made by the county court judge has been persuasively attacked on the tenant's behalf by Mr. Hodson, who says that it is an order of a kind which should not be made, because it does not in fact lead to any alteration in the physical possession of the premises but merely strengthens the landlord's position in point of title and deprives the tenant of such chance as he might otherwise have, if so minded, of extending his accommodation by obtaining possession, on one or other of the statutory grounds, of the upper part of the house against the landlord as his sub-tenant. These arguments are at first sight attractive, because superficially it seems somewhat absurd to make an order for possession, subject to alternative accommodation being provided, and to treat as alternative accommodation the rooms already occupied by the tenant, thus in effect cancelling the operation of the order for possession; but I think that difficulty really only superficial. It is true that the tenant is only in occupation of the lower part of the house, but he is nevertheless in possession of the whole. The landlord has no option but to make a claim for possession extending to the whole of the premises, for that is the only way in which he can determine the tenant's interest.

Looking at the matter from that point of view, the alternative accommodation offered is not simply the identical premises of which the tenant is in law in possession, but the part of those premises of which he is in actual physical occupation and which represents the only part of those premises that is really necessary to provide the accommodation he wants.

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Jenkins L.J.

The lower part of the premises can therefore, in my view, properly be regarded as "alternative accommodation" although it is part of the entire house of which the tenant is at present in possession. That view is borne out by the judgments of the Divisional Court in *Thompson* v. *Rolls* (1), where there arose a situation in some respects similar to that in the present case, the difference being that the rooms not occupied by the tenant, instead of being sub-let to the landlord, were rooms which the tenant used for the purpose of furnished lettings. The Divisional Court in that case found no difficulty in holding that the rooms in the actual occupation of the tenant in the entire house could be regarded as alternative accommodation as compared with the house as a whole.

In my view that decision was right, and I hold, accordingly, that the decision of the county court judge in the present case was in substance correct. But I think that the form of the order which he made is perhaps capable of some improvement. There has been some discussion as to the proper form of order. On the whole, I think it right that there should be an order for possession of the whole of the premises, subject to a proviso to the effect that the tenant is to be entitled to remain in occupation of the lower part of the premises on suitable terms. I gather that the appropriate rent for that part of the premises has already been fixed, and I therefore suggest that the proviso should be simply to the effect that, notwithstanding the order for possession, the tenant is to be entitled to remain in occupation of the lower part of the premises as a weekly tenant of the plaintiff at the weekly rent, which has been fixed.

SOMERVELL L.J. I agree. Before the notice to quit the tenant was the tenant of the whole of these premises, part of which he had sub-let to the plaintiff. After the service of the notice to quit, apart from the Rent Restriction Acts, prima facie the landlord would have been entitled to an order for possession of the whole premises; but, having regard to the Rent Restriction Acts, the tenant's position falls to be considered.

The judge said: "There was no suggestion that this part"—that is, the part which the tenant has occupied in the past and which the landlord has agreed he should occupy in the future—"was not suitable to the tenant's needs in all the "respects by the Act, including the rent required for it";

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(1) [1926] 2 K. B. 426.

and therefore it seems to me that, subject to the tenant's being safeguarded with respect to that accommodation, there is no obstacle provided in the Acts to the making of an order for possession. The only question that arises, as it seems to me, is whether the order for possession should be made for part of the house—that part which the tenant does not desire to occupy—or for the whole house. I have come to the conclusion that the proper form of order is that made by the county court judge so far as this part of the order is concerned: namely, that there should be an order for possession of the whole house. This is necessary and right in order to get rid of the tenant's right to possession of the whole house as statutory tenant. The order should, however, be subject to the tenant's remaining as sub-tenant, on terms which apparently have been agreed, of that part of the house which he has occupied and will continue to occupy. The appeal therefore fails.

EVERSHED M.R. I have felt no doubt that the substance of the order made by the county court judge was just and correct. During Mr. Hodson's argument, however, I felt a greater difficulty than my brethren with regard to the form of the order in the circumstances of this case—an order adjudging that the plaintiff recover possession of all the premises and an order on the defendant to give the plaintiff possession of all the premises—when it was not intended that the order should be executed in those terms or that the actual physical possession of either the plaintiff or the defendant should be affected as regards any room in the house. In view of the opinion of my brethren, and realizing that "possession" does not necessarily mean physical possession, I do not further pursue that matter.

I add that, were it not for the fact that the tenant has claimed to be entitled to remain as the landlord of the plaintiff in respect of the rooms originally sub-let—a claim which I think cannot be sustained—the difficulty would never have arisen. The tenant is only entitled to be protected in his continued occupation of the rooms in which he now in fact lives.

It is unnecessary to express any view whether the accommodation actually enjoyed by a tenant could ever in itself be "alternative accommodation", and I certainly in this case do not decide that it could; but I think, for the reasons my brother Jenkins has stated, that that point does not here

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call for decision. I agree that the appeal should be dismissed, but I think that the order should be varied on the lines my brother Jenkins has suggested.

Appeal dismissed.

Solicitors: *Parfitt, Cresswell & Williams; Willis & Willis.*

B. A. B.

Distinguished. LANGDON v. HORTON [1951] 1 K. B. 666

JONES *v.* WHITEHILL.

[Plaint No. E. 42475]

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1949

Dec. 15.

Evershed M.R., Cohen and Asquith L.JJ.

Landlord and tenant—Rent restriction—Statutory tenant's death—Claim by wife's niece to occupy—Whether entitled as "member of the "tenant's family"—Sufficient residential qualification—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*)*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1935 (25 *Geo.* 5, *c.* 13), *s.* 1.

In 1947 the defendant, out of love and kindness, went to live with her aunt and her aunt's husband. The aunt died in July, 1948, and her husband, who was the statutory tenant of the house where they were living, died some five months later. After his death the plaintiff, as landlord, brought proceedings to recover possession, but the defendant claimed to be entitled to remain in the house as tenant as being a "member of the tenant's "family" within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*g*), as amended.

Held, applying the test laid down in *Brock* v. *Wollams* [1949] 2 K. B. 388, that the defendant was "a member of the tenant's "family" having regard to the fact that she went out of love and kindness to live with the tenant and his wife and look after them in their declining years.

APPEAL from Birmingham county court.

The defendant, Mrs. Whitehill, was the niece of a Mrs. Bailey, who with her husband resided at No. 47 Fentham Road, Birchfields. Early in 1947 the defendant out of love and kindness went to live with her aunt and uncle to look after them in their poor state of health. The aunt died in July, 1948, and her husband died some five months later intestate. He had been tenant of the house under a tenancy agreement and had become before his death a statutory tenant under the Rent Restriction Acts. After his death the defendant claimed to be entitled to remain in the house as tenant under the Increase of Rent and Mortgage Interest

(Restrictions) Act, 1920, as amended (1), but the plaintiff, as landlord of the house, brought proceedings against her in the county court for possession. The county court judge made the order asked for. The defendant appealed.

C. G. Heron for the defendant. The word "family" has a wide meaning, including relatives by blood or marriage. In *Price* v. *Gould* (2), Wright J. pointed out that "the word "'family' was a popular, loose and flexible expression and "not a technical term." The decision there was that brothers and sisters of a tenant were members of his family. In the present case the county court judge held that the relationship depended on consanguinity, but that does not accord with the Court of Appeal's decision in *Brock* v. *Wollams* (3), where an adopted child was held to be a member of the tenant's family. The test whether a person is a member of the tenant's family is whether he or she has a moral duty to the tenant. But apart from any question of moral duty the defendant was clearly a member of the tenant's family. [He was stopped.]

Blennerhassett for the landlord. The decision of this court in *Brock* v. *Wollams* (3) must, of course, be accepted as binding. But, even so, can it be said that the defendant as the niece of the tenant's wife is a member of his family? So to hold would be to widen the meaning of "family" beyond any existing decision. An adopted child is in the same relation to the tenant and to his wife. But the tenant could only have described the defendant as his wife's niece.

[EVERSHED M.R. Or our niece.]

If, after his wife's death, he had been asked whether there was any member of his family residing in the house, he must have answered in the negative.

[EVERSHED M.R. That argument must rest on the necessity for consanguinity.]

Regard must be had to the existing circumstances in seeing what relationship there is. When this is done, it becomes clear that the defendant is not a member of the tenant's family.

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(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*g*), as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1, provides: ". . . . the expression "'tenant' includes the widow of "a tenant who was residing with "him at the time of his death, "or, where a tenant leaves no "widow or is a woman, such "member of the tenant's family "so residing as aforesaid as may "be decided in default of agreement by the county court."

(2) (1930) 143 L. T. 333; 46 T. L. R. 411.

(3) [1949] 2 K. B. 388.

EVERSHED M.R. The short question raised on this appeal is whether the interpretation given to the phrase "member of "the tenant's family" in s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended, is to be carried a stage further than hitherto so as to include the niece of the tenant's wife.

[His Lordship stated the facts and continued :] It is clear that the resident qualification of s. 12, sub-s. 1 (*g*) is satisfied. There remains the question whether the defendant, Mrs. Whitehill, is fairly and properly to be described as a member of the tenant's family. In answering this question we are much assisted by the recent decision of this court in *Brock* v. *Wollams* (1). In the course of his leading judgment in that case, Bucknill L.J. cited the observations of Wright J., in *Price* v. *Gould* (2). Wright J. said, in a passage quoted by Bucknill L.J. (3) : "It has been said in a number of equity "cases, relating principally to wills or to settlements under "powers of appointment, that the word 'family' was a "popular, loose, and flexible expression, and not a technical "term. It had been laid down that the primary meaning "of the word 'family' was children ; but that primary "meaning was clearly susceptible of wider interpretation, "because the cases decided that the exact scope of the word "must depend on the context and the other provisions of the "will or deed in view of the surrounding circumstances."

Then, later, Wright J., was referred to as saying that in the section under consideration the word "family" did include brothers and sisters of the deceased living with her at the time of her death. He thought that that meaning was required by the ordinary acceptation of the word in that connexion, and that the legislature had used the word "family" to introduce a flexible and wide term. Cohen L.J. in his judgment referred again to that language of Wright J., and agreed with it. He further rejected the two alternatives that had been suggested, namely, that the word "family" involved consanguinity, or that it extended to cover anybody in the household. The Lord Justice said that another view appealed to him, namely, that the question whether a particular

(1) [1949] 2 K. B. 388.
(2) 143 L.T. 333 ; 46 T.L.R. 411.
(3) [1949] 2 K. B. 393.

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individual was a member of the tenant's family should be answered according to the ordinary sense of the word "family."

Taking, as I do, the test then adopted by this court as being applicable here, the question I ask myself is whether on the facts the defendant can fairly be described in the ordinary use of language as a member of the deceased tenant's family. It was strongly urged by Mr. Blennerhassett that if we gave an affirmative answer to that question it would follow that nephews and nieces of the wives or husbands of tenants were within the phrase "members of the tenant's family" in all cases, and for all purposes, and that another circle would so be added to a widening series of rings. I am not saying whether or not that would be so: I am not suggesting necessarily that all nephews and nieces by marriage should be regarded as members of the tenant's family. But be it observed here that the defendant, a niece of the tenant's wife, assumed, as we were told, out of natural love and affection, the duties and offices peculiarly attributable to members of a family of going to live with her uncle and aunt to look after them in their declining years. On those facts I think that, if it were asked in ordinary conversation whether the defendant was a member of the tenant's family, an affirmative answer would be given. Applying that test, I come to the conclusion that the defendant should be regarded on these facts as within the protection of the section. On those grounds I hold that this appeal should be allowed and that the action ought to have been dismissed.

COHEN L.J. I am of the same opinion. I only desire to add that I do not think we are differing from the judge on a question of fact. As I read his note he seems to have come to the conclusion that, because the defendant was only a daughter of a sister of the wife and no blood relation of the deceased tenants, she could not be a member of the family. I think therefore that he went wrong in principle, and that, on the facts of this case, without regard to what might happen in other cases, this particular niece by marriage is a member of the family within the meaning of s. 12, sub-s. 1 (*g*). For these reasons I agree that this appeal should be allowed.

ASQUITH L.J. I also agree.

Appeal allowed.

Solicitors: *Underwood & Co., for J. Foley Egginton & Co., Sutton Coldfield; Sharpe, Pritchard & Co., for Bailey, Cox, Bosworth & Co., Birmingham.*

H. C. G.

TURBURVILLE AND ANOTHER *v.* WEST HAM CORPORATION.

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Apl. 23, 24, 28.

Lord Oaksey, Singleton L.J. and Wynn-Parry J.

Local government—Education—Salaries of teachers—Statutory scale—War service—Augmentation of pay—Increments of grade—Increase of statutory scale—Cost of living bonus—Limitation of action—Public authority—Statutory duty—Local Government Staffs (War Service) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 94)*—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21.

At the outbreak of war in 1939 the plaintiffs, two college-trained assistant school teachers, were employed by the defendant corporation, the local education authority. On September 26, 1939, after the passing of the Local Government Staffs (War Service) Act, 1939, the corporation affirmed a resolution, passed on May 23, 1939, of which notice had been given by circular, that all employees of the corporation called up for training or enlisting for service in H. M. forces should "have their pay and any other "allowances receivable by them or their families from time to "time from government or other sources in respect of such training "or service augmented by the council to such a sum as together "will equal the amount of the salary or wages received by them "at the date of their being called up . . . . with such increments, "if any, of their grades which they would have received but for "such leave of absence." It was further resolved that in the event of the corporation granting any bonus owing to the increased cost of living after an employee had enlisted or been called up, that bonus "should not be considered as salary or wages and "should not be payable to that employee." It was conceded that the resolution of May, 1939, formed a term of the plaintiffs' contract of service with the corporation.

The plaintiffs were called up for service in H. M. Forces in 1940 and were demobilized in November, 1945. In August, 1945 the Burnham Committee recommended increased scales of salary for qualified assistant teachers, and by St. R. & O. 1945 No. 1317 the Minister of Education gave effect to the recommendation as from April 1 of that year. The plaintiffs claimed to receive as from April 1 to November, 1945, the benefit of that increased scale as "an increment of their grade," but the corporation contended that the scale introduced by the award was not an increment of the plaintiffs' grade and that in any case some deduction must be made in respect of war allowance included in the award, as being a bonus granted owing to the increased cost of living. Finally, by letter dated February 25, 1946, the corporation formally rejected the plaintiffs' claim. The writs were issued on January 23, 1947, and the corporation, in addition to the above defence, pleaded s. 21 of the Limitation Act, 1939.

Held, (1) that as the increased scale of salary under the Burnham award of 1945 would have been received by the plaintiffs but for their absence on war service, it was an "increment of their "grade," and that the plaintiffs were entitled to the benefit of it, without any deduction in respect of war allowance, for even assuming that the Burnham Committee had taken the increased cost of living into account no part of the increased scale payable under the award was a bonus owing to the increased cost of living granted by the corporation. (2.) That the actions were not barred by s. 21 of the Limitation Act, 1939, because the cause of action was not in respect of any neglect or default in the execution of the Education Act, 1921, or of any public duty, but for the breach of a contract voluntarily entered into by the corporation, and because in any event the plaintiffs' cause of action did not accrue until they received notice of rejection of their claim on February 25, 1946, and therefore the time limit had not expired when the writs were issued on January 23, 1947.

Decision of Byrne J. affirmed.

APPEAL from Byrne J.

The plaintiffs were two assistant teachers, who in 1939 were in the employ of the corporation of West Ham, the education authority of that borough. On May 23 of that year the corporation, having regard to the state of tension which then prevailed, issued to all their employees a notice providing by para. (*c*), " that all such employees as aforesaid " [council employees called up for training or enlisting for service in the armed forces] " have their pay and any other allowances " receivable by them or their families from time to time from " government or other sources in respect of such training or " service augmented by the council to such a sum as together " will equal the amount of the salary or wages received by " them at the date of their being called up for training or " service, with such increments, if any, of their grades which " they would have received but for such leave of absence, " subject to the usual deductions in respect of superannuation."

It was also provided, by para. (*g*), " that in the event of any " bonus owing to the increased cost of living being granted " by the council after any of the employees referred to in the " foregoing paragraphs have been called up for training or " service, such bonus is not to be considered as salary or " wages, and shall not be payable to employees so granted " leave of absence."

On September 5, 1939, the Local Government Staffs (War Service) Act, 1939, was passed, providing by s. 1, sub-s. 1, that where a person serving in his civil capacity as an employee of a local authority ceased so to serve in order to undertake war service, the appropriate authority should have power to pay to him, or to, or for the benefit of his wife or other dependants, " a sum which shall not exceed the remuneration " which he would have received if he had continued to serve " in his civil capacity, after deducting therefrom the amount " of his war service pay."

By a resolution of September 26, 1939, the corporation confirmed the notice of May 23, under the power conferred on them by the Local Government Staffs (War Service) Act, 1939. It was admitted that the provisions of the notice of May 23 therefore became terms of the plaintiffs' contract of service with the corporation.

In 1940 the plaintiffs were called up for service with H.M. Forces, and served until November, 1945, when they were demobilized. They received throughout that war service the augmentation of salary to which they were entitled under para. (*c*) of the notice of May, 1939. In August, 1945, the Burnham Committee reported to the Minister of Education that for qualified assistant teachers (a class to which the plaintiffs belonged) the scale of minimum salary should be 300*l.* a year, with annual increments of 15*l.* The Minister of Education gave effect to that report as from April 1, 1945, and the above scale of salary had been paid by the corporation to all teachers not in the Forces, but not to the plaintiffs and other teachers in the Forces.

The question whether the plaintiffs were entitled to the benefit of the 1945 scales from April 1 to their demobilization in November, 1945, was taken up by the National Union of Teachers, and the corporation considered the matter until February 25, 1946, when they informed the plaintiffs that they had decided " that they were unable to depart from the " system of augmentation of war service pay of teachers to " the level of the basic scales operative prior to the adoption " of the new consolidated Burnham scales." On January 23, 1947, the writs in the present action were issued, additional augmentation of pay on the basis of the 1945 Burnham scale from April 1, 1945, to November, 1945, being claimed.

The corporation denied liability on the ground that the increase of pay claimed was not an " increment " of the plaintiffs' grade or, alternatively, that some deduction must, by reason of para. (*g*) of the notice of May, 1939, be made for war allowance included in the Burnham Committee award

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of 1945. They also pleaded that the action was barred by the Limitation Act, 1939, s. 21 (1).

Byrne J., on January 17, 1950, gave judgment for the plaintiffs holding that they were entitled to have the benefit of the increased scale of salaries under the Burnham Committees' report of 1945, and that the action was not barred by the Limitation Act, the cause of action having accrued only when the corporation notified the plaintiffs of the rejection of their claims. The corporation appealed.

Harold Williams K.C. and *Squibb* for the corporation. These two actions have in the court below been treated as one, and as a test action, to determine the liability of the defendants in respect of what may be described as war-service pay. The corporation are the education authority for their borough, and it is their duty under the Education Act, 1921, s. 148, to provide and maintain schools and appoint and pay teachers. The notice of May 23, 1939, was ultra vires, but the Local Government Staffs (War Service) Act, 1939, empowered the corporation to make the proposed augmentation of the salaries of employees who were called up for war service; and the illegality of the May notice was cured by the second notice of September 26. The corporation admit that they are bound by the notice of May 23, the terms of which became terms of the plaintiffs' contract of service.

The plaintiffs contend that, as from April 1, 1945, they should have received the difference between their military pay and allowances and the salaries of their grade under the 1945 Burnham scale. The contention of the corporation is that the words "increments of their grade" in the notice of May 23 have reference only to the annual increases of the salary of the teachers' grade under the Burnham award of 1938, the then-existing scale. If the plaintiffs had remained in civil employment they would have received the increased 1945 scale of salary as from April 1, and the question is whether they would have received it as an increment of their grade or as the result of being placed in a new grade. It is a matter which affects many hundreds of teachers.

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(1) Limitation Act, 1939, s. 21: "No action shall be brought "against any person for any "act done in pursuance or execu-"tion, or intended execution of "any Act of Parliament, or of "any public duty or authority, "or in respect of any neglect or "default in the execution of any "such Act, duty or authority, "unless it is commenced before "the expiration of one year from "the date on which the cause of "action accrued."

"Grade" must be related to a rate of pay, and it is submitted that each of the payments recommended in the Burnham report defines a grade. In fact "grade" is used in the report in connexion with the type of scale. By para. (*g*) of the notice of May, 1939, a cost-of-living bonus is not to be considered as salary or wages. Teachers of the same certificated class as the plaintiffs received while in civil employment a war allowance of 52*l*. a year. If the 1945 Burnham scale is held to be applicable to the plaintiffs while on war service, some deduction must be made in respect of that war allowance, because the Burnham award includes war allowance.

The judge has held that s. 21 of the Limitation Act, 1939, does not apply because the cause of action did not accrue until the repudiation of the claim by the corporation. It is submitted that he was wrong in that. In his opinion, too, although the corporation had power to augment the plaintiffs' war pay, they were under no duty to do so. It is submitted that the duty to appoint and pay teachers is a public duty under the Education Act, and that when it has been performed it is not possible to pick out one element in the terms of contract and say: "You were under no duty to do "that." The Local Government Staffs (War Service) Act, 1939, gave permissive power to education authorities to make these payments to employees already under contract of service. It merely added a term to the existing contract, and the whole should be regarded as one contract made in the performance of a public duty.

Gardiner K.C. and *Douglas Lowe* for the plaintiffs. The judge came to a correct conclusion. The intention of the notice of May, 1939, was (1.) that those employees of the corporation who went on war service should remain in the same financial position as if they had continued in their civil employment. (2.) That any cost-of-living bonus should not be paid to such employees. Subject to that exception, the manifest intention was to make up to the employee the difference between his army pay and the salary which he would have received if he had remained in the council's employment.

It would be quite wrong to consider the words of the notice of May, 1939, in terms of the then-existing Burnham award. The notice was in general terms and applied to all the corporation's employees, with all sorts of scales of pay. "Grade" in para. (*c*) of the May, 1939, notice does not have the same meaning as it does in the Burnham award. As applicable to teachers it must mean the status of teachers. In connexion with "increment," the corporation seek to use the opposite meaning, but it is submitted that "increment" is used in its ordinary sense of increase of amount, and was not intended to be limited to annual increment. It should be interpreted as covering an increase in the Burnham scale.

It is contended for the corporation that that increase includes a cost-of-living bonus. If the 1945 award falls within para. (*c*) of the notice of May, 1939, it is for the corporation to show that there is something in para. (*g*) which justifies a deduction in respect of war allowance. Under the Burnham 1945 award teachers no longer get a war allowance, but they get an increased salary, which is independent of anything granted by the corporation.

Under the Education Act there is a public duty on the corporation to provide education and maintain schools, but this is not an action for breach of that public duty. There was no obligation on the corporation to make up the employees' salary. They did so under a contract which they voluntarily made, and it was only subsidiary to their duty to provide education. The plaintiffs' cause of action did not accrue until the corporation rejected their claim and therefore the actions were brought in time. [*Milford Docks Co.* v. *Milford Haven U.D.C.* (1); *Clarke* v. *Lewisham Borough Council* (2); *Sharpington* v. *Fulham Guardians* (3); *Bradford Corporation* v. *Myers* (4); and *Mountain* v. *Bermondsey Borough Council* (5) referred to.]

Williams K.C. in reply. Accepting that "grade" in the notice of May 23, 1939, means, in this case, "college-"trained assistant teachers," increment of that grade must be related to the pay of that grade under the Burnham scale of 1938. It is clear that the Burnham award of 1945 included a war allowance, which had previously been paid to employees not on war service, and a deduction must be made in respect of that.

Section 21 of the Limitation Act is applicable when there is a direct and specific duty under a statute which gives power to perform that duty and the particular act is related

(1) (1901) 65 J. P. 483.
(2) (1902) 67 J. P. 195.
(3) [1904] 2 Ch. 449.
(4) [1916] 1 A. C. 242.
(5) [1942] 1 K. B. 204.

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to that duty. *Bradford Corporation* v. *Myers* (1) quite clearly excluded a purely voluntary contract from the protection of the Public Authorities Protection Act, 1893; but throughout the speeches of their Lordships in that case the same principle is to be observed: that the right which an individual seeks to enforce should be related to the discharge of a public duty. The claim here is for a neglect or default in the payment to the plaintiffs of sums due to them, those sums being due under a contract made in the execution of duties under the Education Act, 1921, and legalized by the Local Government Staffs (War Service) Act, 1939. It was a direct exercise of statutory power and was related to the corporation's educational duty. It is a mere addition to a pre-existing contract of service. It is sufficient to establish "that the act was in substance done "in the course of exercising for the benefit of the public "an authority or a power conferred on the public authority, "not being a mere incidental power": per Lord Maugham, in *Griffiths* v. *Smith* (2).

Lowe, following in reply. *Griffiths* v. *Smith* (2) is distinguishable. In each instance their Lordships are szying that it is a crucial fact, as found by Tucker J., that at the material time what was being done was something associated with an elementary school.

Cur. adv. vult.

April 28. LORD OAKSEY read the following judgment, in which after stating the facts he continued: In August, 1945, the Burnham Committee reported to the Minister of Education that the scales of minimum salary for qualified assistant teachers, a class of teacher to which the plaintiffs belonged, should be 300*l.* a year, with annual increments of 15*l.*; and also by para. 16 it was provided: "No "teacher in service on March 31, 1945, shall receive by "reason of the operation of these scales a smaller rate of "salary than he/she would have been eligible to receive under "the operation of the Burnham reports as in force on that "date. (*b*) For the purpose of this section the rate of salary "shall be computed by adding together (i) scale salary "(ii.) war allowance, and (iii.) while the teacher remains in "the same post any allowance paid to the teacher on March 31, "1945, under previous Burnham reports." The Minister of

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(1) [1916] 1 A. C. 242.

(2) [1941] A. C. 170, 185.

Education gave effect to this report, and as from April, 1945, this scale of salary has been paid to all teachers not in the Forces, but not to these plaintiffs and other teachers in the Forces.

On February 17, 1945, in anticipation of the new Burnham scales, the corporation asked for the advice of the Burnham Committee whether they ought to augment the salaries of teachers on the basis of the new scales without regard to a war bonus, and on September 7, 1945, and again on October 26, 1945, they wrote to one of the plaintiffs that, as soon as a decision had been reached as to the applicability of the new scales, they would make the necessary adjustment in their payments to him. The matter was taken up by the General Secretary of the National Union of Teachers in January, 1946, and it was not until February 25, 1946, that the plaintiffs were informed that the corporation had decided "that they "were unable to depart from the system of augmentation "of war service pay of teachers to the level of the basic scales "operative prior to the adoption of the new consolidated "Burnham scales." The present action was begun on January 23, 1947.

In these circumstances four questions have been raised and argued: (1.) Do the words "increments, if any, of their grades "which they would have received but for such leave of "absence" in para. (*c*) of the notice of May 23, 1939, refer only to the annual increments provided for in the scales of salary then in force, or do they refer also to increments provided for by the scale of salaries introduced as from April 1, 1945? (2.) Should any deduction be made in respect of war allowance, on the ground that the scale introduced on April 1, 1945, must be taken to have included a bonus owing to the increased cost of living within the meaning of para. (*g*) of the said notice? (3.) Does the action fall within s. 21 of the Limitation Act, 1939. (4.) Is the action barred in the circumstances of these cases?

In my opinion the scale introduced on April 1, 1945, was an increment within the meaning of para. (*c*) of the notice of May, 1939, and the plaintiffs were entitled to be paid accordingly. The word "increments" in para. (*c*) is not qualified in any way, and undoubtedly the plaintiffs would have received the scale obtaining for their grade of teacher after April 1, 1945, but for their leave of absence. That scale was not, in

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my opinion, a bonus owing to the increased cost of living, granted by the corporation within the meaning of cl. (*g*) of the said notice, and the fact that the Burnham Committee in recommending it may have taken into account the increased cost of living is neither relevant nor proved ; nor is the fact that para. 16 of the Burnham report uses war allowance as a factor in calculating the minimum salary which any teacher shall receive of any relevance.

I turn therefore to the much-discussed question of the construction of s. 21 of the Limitation Act, 1939. Counsel for the corporation does not contend that the neglect complained of was in the execution of the Local Government Staffs (War Service) Act, 1939, which, he concedes, alone made the payments intra vires, but says that it was in the execution of the Education Act, 1921, which, by s. 148, empowers the local education authority to appoint and pay teachers. I think that counsel was bound to concede that the payment of teachers while on war service was ultra vires under the Education Act, and only became intra vires by virtue of the Local Government Staffs (War Service) Act, 1939. But it may be said that the payments were made in execution of that Act, or come within these words used by Viscount Maugham in *Griffiths* v. *Smith* (1) : " It is sufficient to establish that the act was in substance " done in the course of exercising for the benefit of the public " an authority or a power conferred on the public authority " not being a mere incidental power, such as a power to carry " on a trade. The words in the section are ' public duty or " ' authority ' and the latter word must be taken to have its " ordinary meaning of legal power or right, and does not " imply a positive obligation."

So here it may be said the act of agreeing to pay and of paying or neglecting to pay was in substance done in the course of exercising for the benefit of the public an authority or a power, though not a duty of positive obligation, conferred on the public authority by the Local Government Staffs (War Service) Act, 1939, and that this was not a merely incidental power such as a power to carry on trade.

The real question seems to me to be whether the payment was made " for the benefit of the public." It was made by the corporation to all their employees equally ; but it was not made on the condition that the employees should return to the service of the corporation after their war service. It appears to me, therefore, that it may more properly be said to have been made for the benefit of the employees, though it may have had an indirect bearing upon the morale of the employees who were not called up and upon other members of the public.

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(1) [1941] A. C. 170, 185.

In the case with which Lord Maugham was concerned, the school premises were being used for a purpose which the trial judge had expressly found was a school purpose, and Lord Maugham said that this finding was crucial. In the present case there is no such finding; nor, in my opinion, could there have been, for the payments were to be made to employees who were no longer employed in the work of the council, and who might never again be so employed.

It is to be observed that Lord Porter (1) expresses the view, with which I agree, that, in order that the act done should be held to be done in the exercise of a public duty, there must be a correlative public right. In the case which he was then discussing there was in a sense a correlative right on the part of the parent to be present in the school as an invitee, though not one of positive obligation. But here the teacher had no correlative right to the augmented payments, which were entirely in the discretion of the corporation; and there is no finding that the payment was made in the interests of the school as such, as there was in *Griffiths* v. *Smith* (2). On the whole, therefore, though not without hesitation, I come to the conclusion that the section is not applicable to the present case.

On the last question I am of opinion that in any event the corporation cannot succeed in view of the correspondence, which shows that they led the plaintiffs to believe that the question whether these payments were going to be made was under consideration until February, 1946. In such circumstances the corporation cannot be heard to say that there was a cause of action before that date.

SINGLETON L.J. The plaintiffs' claim is based on para. (*c*) of the resolution of the corporation dated May 23, 1939, and published by them on June 1.

[His Lordship read the resolution and continued:] The word "increments" as used there is not a term of art; it bears no direct relation to the "annual increments" mentioned in the 1938 Report of the Burnham Committee. The resolution of the corporation was not concerned with teachers only, but with the corporation's employees generally. The word "increment" means an increase or an addition to something. The result of the resolution was that the corporation undertook to make up the amount of government pay and allowances to the amount of the salary or wages the employee was receiving at the date of his being called up for service, plus any increase granted to those of the grade which the employee occupied, and which he would have received had he not been given leave of absence to undertake service with His Majesty's Forces.

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(1) [1941] A. C. 208, 209.

(2) Ibid. 170.

There were increases after each of the plaintiffs joined the Forces, and those were allowed in the calculation of the amounts due to them until March 31, 1945. As from that date teachers employed by the corporation were paid on a higher scale, as recommended by the 1945 Report of the Burnham Committee. It is not disputed that, had each of the plaintiffs remained throughout as a teacher, he would at the material time have been entitled to be paid on the higher scale. To my mind this was an increase in pay, and it is covered by the words "increments of their grades" in para. (*c*) of the resolution which I have read.

The plaintiffs are therefore entitled to succeed in their claim subject to para. (*g*) of the resolution, on which the corporation rely. The plea at the end of para. 10 of the defence is that the 1945 scales of payment to teachers include war bonus, and that under para. (*g*) of the resolution such a bonus is not to be considered as salary or wages "and shall "not be payable to employees so granted leave of absence." This is in the nature of an exception from the promise made to, or the contract made with, an employee who joined the Forces. If the corporation can establish it, they are entitled to relief to the extent to which they show that the increment or increase is a bonus owing to the increased cost of living granted by the corporation after the employee was called up. The proof of that is clearly on them. There is no evidence to show the way in which the Burnham Committee arrived at their conclusions in 1945, or of what it was that caused the Board of Education to accept their recommendations. No doubt the committee had in mind the increased cost of living when they reported in 1945; but it seems to me to be impossible to say positively that any part of the increased scale of pay was a bonus owing to the increased cost of living granted by the corporation within para. (*g*) of the resolution. The increase in the scale of pay was made to teachers generally after the report of the Burnham Committee in 1945.

I now come to the plea in para. 11 of the amended defence, to the effect that the corporation rely on s. 21 of the Limitation Act, 1939. There was some uncertainty in the minds of the corporation as to the effect of the 1945 scale of pay, and on February 17, 1945, they wrote to the Secretary of the Burnham Committee a letter inquiring about the position. One paragraph of the letter states: "Although the proposed new "scales of teachers' salaries are consolidated, and war bonus "is not identified as such, the opinion is held that some amount "due to increased cost of living was in the minds of the "Burnham Committee in formulating the scales, and this "gives rise to the point on which the council desire to be "informed, which is—are they expected to augment salaries "on the basis of the new scales without regard to a war bonus "aspect? This would act, it is feared, to the prejudice of or "unfairly as compared with other employees of the council "whose bonus has not been consolidated"; and towards the end of the letter the council say: "therefore, an answer is "desired to the questions: are the council compelled to "use the new scales of salaries in connexion with augmentation? If so, what amount in the new salary scales can be "regarded as covering the increased cost of living."

As far as the documents show, no answer was received to that communication, but on May 30, 1945, the corporation issued a notice which is headed: "To teachers serving in "His Majesty's Forces," and that includes the plaintiffs, who still were. That sets out certain details which are required, and at the foot of the document there is a memorandum in these terms: "The question of the augmentation of your "salary to the New Burnham Scale is under consideration "by the appropriate committee of the corporation, and "up to the moment no decision has been given. In the "meantime, payment is being made to all West Ham teachers "upon the basis of their March 1945 salary—subject to any "necessary adjustment in due course."

There was further correspondence lasting for some months, and it was not until January 31, 1946, that the corporation arrived at a decision. In a letter of that date addressed to the General Secretary of the National Union of Teachers they

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wrote: "Having carefully considered the matter from all "aspects, and also had in mind that the teachers returning "from service will be coming back to positions carrying "consolidated rates of pay under the new Burnham scales, "the committee reported that they were unable to recommend "the council to depart from the system of augmentation "operative prior to the new consolidated rates being adopted, "which is governed by their resolutions dealing with the "augmentation of service pay. The report of the committee "was submitted to and adopted by the council at their last "meeting."

The decision of the corporation is there communicated to the adviser of the plaintiffs by letter of January 31, 1946. Later the corporation asked the plaintiffs for details of the pay and allowances. In May, 1946, the corporation received a deputation, and there was further correspondence; but on December 7, 1946, the claim of the plaintiff was finally rejected. The corporation indeed wrote a letter which contained this paragraph: "The committee deplore the further "revival of this claim which they cannot regard as being "well-founded either in law or equity, and they must "reject it."

The writ was issued on January 23, 1947, and I think it a matter for regret that a plea under the Limitation Act, 1939, is raised in view of this correspondence and of the negotiations which had taken place in the effort of the teachers and the National Union of Teachers to avoid litigation. Perhaps people were apt to look upon matters of this kind, in the year 1947, in a somewhat different way from that in which they approached them in the middle of 1939. The disposition generally for some years, I think, has been as far as possible to negotiate upon matters, in order to avoid litigation. The result of this plea may well be somewhat different. One cannot imagine, at least, that the National Union of Teachers will be slow to issue a writ in the future if they have a dispute, as they may well have, with local authorities.

That which has to be decided in the first place is, what is the effect of this correspondence. The corporation say that the question is under consideration by them. The result of their deliberations is shown by the letter of January 31, 1946—that was the awaited communication. The action was brought within one year from that date. The answer to the question depends on the construction of the memorandum of May 30, 1945. That contains a promise that any necessary adjustment will be made in due course. Does it mean, "if you do not "take any steps to enforce your rights meanwhile we will "make any necessary adjustment, and in the meantime time "shall not run"? No steps were taken by the plaintiffs' advisers until the corporation had signified their decision not to make any adjustment. It is claimed on behalf of the plaintiffs that time does not run until the corporation indicated their decision to them. Certainly a strong case is made that the corporation ought not to be allowed to take advantage of the plaintiffs' forbearance, in view of the correspondence, and particularly in view of the document of May 30, 1945. I prefer, however, to base my opinion on the applicability of s. 21 of the Limitation Act on another ground.

The plea under the statute is in general terms. In the course of Mr. Williams' reply I asked him to specify the part of s. 21 under which he claimed that the case fell, and he answered that the corporation's case was that the failure to pay was neglect or default by the corporation in the execution of their duty under the Education Act, 1921. Under s. 148, sub-s. 1 of that Act the local education authority are empowered to appoint teachers and to assign salaries or remuneration to them. The claim of the plaintiffs is not in relation to any duty under that section. No complaint is made by the plaintiffs that the corporation failed in any duty arising under the Education Act. It is said that they owe money by reason of a contract made with, or a promise made to, certain teachers at a time of national emergency. The corporation, like other authorities, had issued circulars in the early part of 1939. A question arose whether they had power to make payments of the kind which they were offering to make, and, it may be, in some cases, making. To set this question at rest, the Local Government Staffs (War Service) Act, 1939, was passed on September 5, 1939. The schedule to that Act embraces a variety of employees of local authorities and others; it includes teachers. Each of the plaintiffs was, in fact, called up for military service or joined the Forces after the passing of this Act. No doubt it was praiseworthy for local authorities to encourage their employees to join the Forces in time of national emergency. I cannot see that in agreeing to pay them

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the amounts set out in the resolution they were thereby undertaking a public duty within the meaning of s. 21 of the Limitation Act. They were not bound to make such an agreement with their teachers or with any other employees. They entered into a contract voluntarily, and when they made payments under such a contract they did so in pursuance of the contract and not in the execution of any public duty. The subsequent failure to pay amounts due is not neglect or default in the execution of a public duty, for there was no such public duty, and if it should be argued—and it was not—that it was neglect or default in the execution of any public authority, the same reasoning applies. Authority was given by the Act of 1939 to make the payments, but that authority so given was not a public authority. It was no more than an authorization to the appropriate authorities to make payments without which authorization the payments might not have been within the power of the appropriate authority. In other words, it was enabling the corporation to do what they had promised by their circulars.

The principle underlying a plea under the statute is thus set out in Halsbury's Laws of England (2nd ed.), vol. 26, at p. 294, para. 612: "The performance, or breach, of a "contract which a public authority has power, but not the "duty, to make, is not within the protection." That, in essence, was the submission of Mr. Gardiner, or Mr. Lowe in the course of a further reply on behalf of the plaintiffs.

Mr. Williams, on behalf of the corporation, did not discuss very fully this part of the case when opening the appeal; but, in the course of his reply, he cited *Griffiths* v. *Smith* (1). The words of Lord Maugham, which have been read by my. Lord, provide the strongest argument for the corporation. It is important to notice what kind of case was then under consideration. The action was against the managers of a school and arose out of a defect in the school building, a floor of which collapsed as the result of which serious injuries were caused to the plaintiff, who was attending on invitation an exhibition of work of the pupils, of whom her son was one.

Lord Simon L.C. (2) said this: "It is true that St. Clement's "school could have been carried on without arranging to hold "this display. But that is not the true test. The real "question is whether the managers, in authorizing the issue

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(1) [1941] A. C. 170, 185.

(2) Ibid. 179.

"of invitations to the display on the school premises after "school hours, should be regarded as exercising their function "of managing the school. To apply the distinction indicated "by the Master of the Rolls, was the managers' action 'some-"'thing incidental to, part of, the process of carrying on' "their statutory duty? Both the trial judge and the Court "of Appeal took the view that in this matter the managers "were doing an act which formed part of the operation of "carrying on a public elementary school. As the Master of "the Rolls observed, a gathering such as this is a very familiar "type of gathering in schools of all sorts. Tucker J. reached "his conclusion in a passage which I must quote: 'In my "'view, the managers had a material interest in inviting the "'plaintiff to the premises, in the sense that it was in the "'interests of the prosperity and success of the school to "'enlist the support and co-operation of the parents of the "'pupils in the work done at the school. The display in "'question consisted entirely of an exhibition of the work "'done by the pupils and of the singing of songs which they "'had learnt at the school. I accordingly hold that the "'plaintiff was an invitee, and not a mere licensee. I am "'further of opinion that on the occasion in question the "'school was being used as a public elementary school, and "'not for some extraneous purposes unconnected with its "'functions as a school.'"

Lord Maugham (1) said: "I have nothing to add to what "the noble Lord on the woolsack has already said as regards "the occasion itself. It was in fact an exhibition of work "done by the pupils and a performance of songs which they "had learnt at the school. It was held by Tucker J., that "this was a use for the purposes of a public elementary school. "The Court of Appeal agreed with this crucial finding of fact, "and I do not think that any of your Lordships felt any "doubt that that finding was justified." In another passage (2), Lord Maugham considered the importance of certain features of that case, and he referred to the decision of the House of Lords in *Bradford Corporation* v. *Myers* (3). The words of Lord Maugham (2) have been read by my Lord, and I do not want to read them again. I do not regard them as covering this case, or, as I say, the principle stated in the *Bradford Corporation* case.

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(1) [1941] A. C. 181–2.

(2) Ibid. 185.

(3) [1916] 1 A. C. 242.

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In *Griffiths* v. *Smith* (1), Lord Wright said that the decision in the *Bradford* case (2) showed that the thing done is not necessarily done in the execution of a public duty or authority by a statutory corporation merely because it is intra vires. I draw attention to the words of Lord Porter in the same case.

I think it desirable to refer to *Bradford Corporation* v. *Myers* (2), as that decision seems to me really to be nearer the present case than is that in *Griffiths* v. *Smith* (1) having regard to the facts of the different cases. In *Bradford Corporation* v. *Myers* (2) the defendants, a municipal corporation, were authorized by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district. They were also empowered to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months afterwards the plaintiff began an action of negligence against the defendants. The defendants pleaded s. 1 of the Public Authorities Protection Act, 1893, as a bar to the action: It was held, to quote the headnote in the Law Reports, " that " the act complained of was not an act done in the direct " execution of a statute, or in the discharge of a public duty " or the exercise of a public authority, and that the Public " Authorities Protection Act, 1893, afforded no defence to " the action."

Lord Buckmaster L.C. (3), said: " The difficulty cannot, " I think, be resolved by the simple distinction between " questions of tort arising out of contract and questions of " tort arising independently of contract; but the fact that " actions on contract made by the local authorities have been " held to be outside the statute shows that the courts have " considered the words of the Act to need careful and strict " scrutiny. This, indeed, is apparent both from the purpose " and the language of the statute. Its effect is to limit, as " against the general public and in favour of certain persons, " the period for bringing actions already fixed by existing " statutes, and at the same time to penalize all persons who " bring such actions and fail, by making them pay solicitor " and client instead of party and party costs."

(1) [1941] A. C. 170, 193, 208.

(2) [1916] 1 A. C. 242.

(3) Ibid. 246, 247.

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Lord Buckmaster added: "In other words, it is not because "the act out of which an action arises is within their power "that a public authority enjoy the benefit of the statute. "It is because the act is one which is either an act in the direct "execution of a statute, or in the discharge of a public duty, "or the exercise of a public authority. I regard these latter "words as meaning a duty owed to all the public alike or an "authority exercised impartially with regard to all the public. "It assumes that there are duties and authorities which are "not public, and that in the exercise or discharge of such "duties or authorities this protection does not apply. This "distinction is well illustrated by the present case. It may "be conceded that the local authority were bound properly "to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most "obvious and ordinary way. Still less was there any duty "to dispose of them to the respondent. No member of the "public could have complained if the respondent had not been "supplied; nor had any member of the public the right to "require the local authority to contract with him."

With that speech of Lord Buckmaster, Lord Dunedin was in complete agreement. Lord Haldane (1) said: "My Lords, "I think that Farwell J. was right"—that was Farwell J.'s decision in *Sharpington* v. *Fulham Guardians* (2)—"for it "seems to me that the language of s. 1 does not extend to an "act which is done merely incidentally and in the sense that "it is the direct result, not of the public duty or authority "as such, but of some contract which it may be that such "duty or authority put it into the power of a public body "to make, but which it need not have made at all."

The neglect or default of the corporation was not in regard to a public duty or in regard to a public authority: it arose out of a failure to fulfil a promise or to carry out the terms of a contract. In making that promise or in entering into the contract the corporation were not carrying out any duty under the Education Act: they were doing something voluntarily, because they thought it the right thing to do. They were in no sense bound to do it: there was no obligation upon them to pass the resolution or to publish it. It was open to them to withdraw it at any time, except as to persons who had acted upon it; and, if they had done so, they could not

(1) [1916] 1 A. C. 252.

(2) [1904] 2 Ch. 449.

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have been properly charged with neglect of any public duty. In my view this case is covered by the decision of the House of Lords in *Bradford Corporation* v. *Myers* (1), and s. 21 of the Limitation Act, 1939, does not apply. The appeal should in my opinion be dismissed.

WYNN-PARRY J. I agree. On the question of construction I would observe that according to the Oxford Dictionary the word "increment" is a word of wide meaning. It does not import of itself the limitation that it is referable only to a payment that is annual. In order that it should in a particular case bear such a limited meaning a proper context must be provided. There is nothing upon the face of the resolution of May 23, 1939, which provides such a context. It is true that, so far as concerns the rate of payment of certificated assistant teachers, they are entitled to a minimum payment and an annual increment on it with the limitation of a maximum.

On the other hand the resolution in question extends to all employees of the corporation. Prima facie, the word "increment" should be given the same meaning to whatever class of employees it is applied. It is not shown by the evidence that all classes of employees were employed on the terms that they should be entitled to annual increments, in which case it might be said that the necessary context had been provided for limiting the meaning of increment in the resolution. Many of the employees may well have been employed upon different bases.

Thus it follows that the circumstance that the members of a particular class of employees, the assistant certificated teachers, were entitled to annual increments does not provide a sufficient context, even in the case of this class, to limit in the resolution the wide meaning of the word "increment."

I do not desire to add anything to what has been said by the other members of the court upon the contention put forward by the corporation under para. (*g*) of the resolution.

As regards the applicability of s. 21 of the Limitation Act, 1939, I agree that the original contracts between the corporation and the respective plaintiffs were made by the corporation in the direct execution of their public duty under the Education Act, 1921, and that s. 21 would apply to those contracts.

(1) [1916] 1 A. C. 242.

I further agree that the effect of the resolution was to add to the contractual terms between the corporation and the respective plaintiffs. I do not agree, however, with Mr. Williams that the result follows for which he contends, namely, that those terms are to be so read into or with the original contracts that it can be said of them that, just as s. 21 of the Limitation Act, 1939, applies to the original contracts, so it must apply to the added terms. Such a result would be plainly contrary to the facts. Unlike the original contracts, the added terms were not brought into existence under or pursuant to the Education Act, 1921. Indeed they could not be justified under that Act. They were brought into existence by virtue of the Local Government Staffs (War Service) Act, 1939, and the applicability or otherwise of s. 21 of the Limitation Act, 1939, must be tested by reference to that Act.

The effect of that Act was to do no more than authorize the corporation, if they should think fit, to arrange with the plaintiffs, either as a voluntary act or as a contract, to make the payments mentioned in section 1. If and so far as the corporation exercised that authority in any case, it did not do so, in my view, in pursuance or execution of any Act of Parliament or of any public duty or authority. All they did was to enter into a private arrangement with the plaintiffs which but for the statutory authority in question it could not have done.

In *Griffiths* v. *Smith* (1), Lord Maugham said: "It is "sufficient to establish that the act was in substance done in "the course of exercising for the benefit of the public an "authority or a power conferred on the public authority "not being a mere incidental power, such as a power to carry "on a trade." From this, I think, it must follow that for an authority to be a public authority within s. 21 of the Limitation Act, 1939, it must be an authority exercised or capable of being exercised for the benefit of the public. Undoubtedly s. 1 of the Local Government Staffs (War Service) Act, 1939, gives the corporation an authority; but in my view, it was no more than a power to do that which otherwise they could not have done (but which they and probably other authorities had attempted to do), namely, to make payments for the benefit of individual employees in any case where they thought fit to do so. Thus, although the authority is given to public

(1) [1941] A. C. 170, 185.

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authorities, it is not a public authority within s. 21 of the Limitation Act, 1939. Therefore, that section does not apply in the present case.

Lastly, I agree with Lord Oaksey that even had our conclusion on this point been otherwise, the corporation by their conduct are not entitled to rely on s. 21. In my view, the effect of the correspondence, which was read to us, was clearly to establish an agreement between the parties that the plaintiffs should hold their hands until the corporation had finally determined their attitude. The corporation's final determination was not communicated to the plaintiff's until February 25, 1946, less than a year before the issue of the writs on January 23, 1947.

Appeal dismissed.

Solicitors: *G. E. Smith; K. Wormald.*

A. W. G.

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KNIGHTSBRIDGE ESTATES TRUST LD. *v.* DEELEY

Landlord and Tenant—Rent restriction—Dwelling-house to which Rent Restriction Acts apply—Tenancy at rent less than two-thirds of rateable value—Sub-letting—Termination of tenancy—Sub-tenant not protected—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 7, *and s.* 15, *sub-s.* 3.

Where the rent of a tenant of a dwelling-house to which the Rent Restriction Acts apply, payable in respect of the tenancy, is less than two-thirds of the rateable value of the dwelling-house, by virtue of s. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that Act does not apply to that rent or to that tenancy, and the Act applies in respect of that dwelling-house as if no such tenancy existed or ever had existed. Accordingly, in such a case, where the tenant has sub-let the premises and subsequently the lease is determined, the sub-tenant cannot obtain the advantage of s. 15, sub-s. 3, of the Act of 1920 and be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued, since the first words of sub-s. 3: "Where the interest "of a tenant of a dwelling-house to which this Act applies is "determined," are not satisfied: the "interest of a tenant of a "dwelling-house to which this Act applies"—that is the tenancy—

has not determined; for by the terms of sub-s. 7 of s. 12 the Act of 1920 is to apply to the dwelling-house as if no such tenancy existed, and, if there is no such interest, it cannot have been determined. The sub-tenant's interest in the premises, not being protected by statute, is at common law automatically extinguished, and he becomes a trespasser.

APPEAL from Westminster county court.

On December 9, 1931, the plaintiffs let a dwelling-house, No. 43 Chesham Mews, to a Miss Strutt for seventeen years from December 25, 1931, at an annual rent of 20*l.* a year, payable quarterly. In November, 1943, the tenant assigned her lease to one Ellis, who in turn re-assigned the lease to one Wade in July, 1946. Miss Strutt sublet the premises, before she had assigned them, to Mrs. A. Deeley, the defendant. The sub-tenancy was for one year certain and thereafter on a quarterly tenancy at an exclusive rent of 35*l.* a year which was later increased to 70*l.* and then to 75*l.* a year. The head-lease having expired on December 25, 1948, by effluxion of time, the landlords claimed possession of the premises on the ground that the sub-tenant was a trespasser. She defended the action on the ground that by virtue of s. 15, sub-s. 3 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, she must be deemed to have become the tenant of the landlords on the same terms as she would have held from the tenant if the tenancy had continued. The tenant had sub-let the premises to the sub-tenant in breach of cl. 16 of the head-lease "without the "previous consent in writing of the lessors," but that breach, it was conceded, had been waived by the landlords' acceptance of rent from the two assignees of the lease with full knowledge of the breach. The landlords contended that, since by the head-lease the premises had been let at less than two-thirds of their rateable value (56*l.* at the termination of the lease), the Act did not apply to that tenancy and it applied in respect of that dwelling-house "as if no such tenancy "existed or ever had existed": see s. 12, sub-s. 7 of the Act of 1920; that sub-section 3 of s. 15 only applied, "where the "interest of a tenant of a dwelling-house to which this Act "applies is determined"; that was a dwelling-house to which the Act applied; but that, by reason of s. 12, sub-s. 7, there was no interest of a tenant of the house. Accordingly no interest of a tenant had determined and sub-s. 3 of s. 15 did not apply.

Judge Drucquer gave effect to the landlords' contention and made an order for possession. The defendant sub-tenant appealed.

Sofer for the sub-tenant. For the sub-tenant to succeed three things must be proved: (1.) that this house was a dwelling-house to which the Rent Restriction Acts applied; (2.) that Miss Strutt, the tenant, and her assignees were tenants who had an interest in the dwelling-house (it is submitted that it does not matter whether that interest is protected by the Acts or not); and (3.) that the sub-tenant was a sub-tenant to whom the premises had been lawfully sub-let at a rack rent. The third point is now conceded by the landlords. It is submitted that on the determination of the lease of the tenant, the sub-tenant who is a sub-tenant at a rack rent is protected by sub-s. 3 of s. 15 of the Act of 1920 (1). The question for decision in this case is whether her rights are affected by s. 12 sub-s. 7 of the Act of 1920 (1) by reason of the fact that the rent payable by the tenant was less than two-thirds of the rateable value of the dwelling-house.

[*Pearl* for the landlords intervened to say that points 1 and 3 were conceded.]

The second point depends on the construction of sub-s. 3 of s. 15. The relevant words are: " Where the interest of " a tenant "—pause—" of a dwelling-house to which this Act " applies "—pause—" is determined. . . . ." There was in fact an interest of a tenant and that interest has determined. It is admitted that the dwelling-house, as such, is one to which the Act of 1920 applies.

There is no doubt that if the dwelling-house were not one to which the Act applied the sub-tenant would not be protected: *Wright* v. *Arnold* (1) and *Cow* v. *Casey* (2). But in this case the dwelling-house is one to which the Act applied. It is this fact which protects the sub-tenant. The test is not whether the tenant had an interest to which the Acts applied but whether she had an interest, whether protected or not, in a dwelling-house to which the Rent Restriction Acts applied. Once it is shown that the dwelling-house is one to which the Acts apply, the lawful sub-tenant at a rack rent of the tenant of such a house is protected.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 7: " Where " the rent payable in respect of " any tenancy of any dwelling-" house is less than two-thirds " of the rateable value thereof, " this Act shall not apply to that " rent or tenancy, nor to any " mortgage by the landlord, from " whom the tenancy is held, of " his interest in the dwelling-" house and this Act shall apply " in respect of such dwelling-" house as if no such tenancy " existed or ever had existed."

Section 15, sub-s. 3: " Where " the interest of a tenant of a " dwelling-house to which this " Act applies is determined, either " as the result of an order or " judgment for possession or eject-" ment, or for any other reason, " any sub-tenant to whom the " premises or any part thereof " have been lawfully sub-let shall, " subject to the provisions of " this Act, be deemed to become " the tenant of the landlord on " the same terms as he would " have held from the tenant if " the tenancy had continued."

The Rent Restriction Acts apply in rem: contrast s. 15, sub-s. 3 with the terms of sub-s. 3 of s. 2 of the Landlord and Tenant (Rent Control) Act, 1949, where it is the tenancy itself which must be one to which the Rent Acts apply: "This "section applies to any tenancy of a dwelling-house, being "a tenancy to which the principal Acts apply, such that when "the dwelling-house is let under the tenancy, it is a dwelling-"house to which the principal Acts apply." This section is of value in the interpretation of s. 15, sub-s. 3 of the Act of 1920.

The object of s. 12, sub-s. 7 of the Act of 1920 was to prevent ground rents paid on building leases from becoming the standard rent: see the observations of Scrutton L.J., in *Brookes* v. *Liffen* (3). There is no reason why the sub-lessee at a rack rent of a tenant who pays a ground rent should not enjoy the same protection as the sub-lessee at a rack rent of a tenant who pays a rack rent. If the one is protected when the interest of the tenant comes to an end, so should the other be. [*Watson v. Saunders-Roe Ld.* (4) also cited.]

Pearl and *Basil Austin* for the landlords. The argument for the sub-tenant is wrong in principle and on the construction of the two sub-sections. In *Cow* v. *Casey* (2) Lord Greene M.R. said (5): "It was clearly said in that case"—*Wright* v. *Arnold* (1) —"that the true meaning of sub-s. 3 is what I have stated it "to be, that it only applies where the tenant is tenant "of a house to which the Act applies." By sub-s. 7 of s. 12 the Act of 1920 does not apply to this tenancy, and the Act is to apply in respect of the dwelling-house "as if no such "tenancy existed or ever had existed." If the tenancy never existed, it cannot have been determined and the protection afforded by sub-s. 3 of s. 15 does not attach to this sub-tenant. Lush J., said in *Waller and Sons Ld.* v. *Thomas* (1) that the effect of sub-s. 7 of s. 12 of the Act of 1920 was to take the tenancy to which it applied entirely outside the operation of the Act, although the Act still applied to the dwelling-house itself. " The interest of a tenant of a dwelling-house," within the meaning of sub-s. 3 of s. 15 is simply " the tenancy," as appears from the last words of the sub-section.

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(1) [1947] K. B. 280.
(2) [1949] 1 K. B. 474.
(3) [1928] 2 K.B. 347, 349.
(4) [1947] K. B. 437.
(5) [1949] 1 K. B. 474, 480.

Sofer in reply. Many building leases at ground rents in London will be falling in during the next ten years, and if the sub-tenants are held to be unprotected the whole policy of the Rent Restriction Acts will be defeated in these cases. The interpretation contended for by the landlords here would appear to be contrary to public policy.

Cohen L.J. I will ask Asquith L.J. to deliver the first judgment.

Asquith L.J. [after referring to the facts :—] The question raised in the appeal is whether the defendant can claim to retain possession by virtue of s. 15, sub-s. 3 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, having regard to the terms of s. 12, sub-s. 7. The county court judge has held that he cannot. At common law, of course, a sub-lessee's interest would be extinguished automatically when the head lease, from which it was carved out, had expired. If it is not so extinguished in this case, this can only be by the operation of s. 15, sub-s. 3. Can the defendant bring herself within the terms of that provision ? The protection which sub-s. 3 accords to a sub-tenant is only available in cases where, as is said in the first two lines of the sub-section, " the interest of a tenant of a dwelling-house to which this " Act applies is determined." " The tenant " here clearly means the head tenant ; it can mean nothing else in a case like the present where there are only three dramatis personæ, the landlord, the head tenant, and the sub-tenant.

It is conceded that the dwelling-house is a dwelling-house to which the Act applies, but what the sub-tenant has further to establish is (1.) that the person from whom he took the sub-lease of such a dwelling-house had the " interest of a tenant

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(1) [1921] 1 K. B. 541, 546.

" of a dwelling-house," and (2.) that that interest had " determined." Now " the interest of a tenant of a dwelling-house " is simply his tenancy. What else can it be ? The wording of sub-s. 3 of s. 15 supports that view, because, while it speaks in the first line of " the interest of a tenant of a dwelling-" house," in the last line it uses the words " the same terms " as he would have held from the tenant if the tenancy had " continued," obviously drawing no distinction between the word " tenancy " and " interest of a tenant." The draftsman seems to treat them as synonyms. Section 12, sub-s. 7 of the Act of 1920 makes provision as to certain tenancies. Omitting immaterial words, it reads thus : " Where the rent " payable in respect of any tenancy of any dwelling-house is " less than two-thirds of the rateable value thereof, this Act " shall not apply to that rent or tenancy . . . . and this " Act shall apply in respect of such dwelling-house as if no " such tenancy existed or ever had existed." I think it fairly clear that the object of that provision was to meet a case in which the head lease on foot at the material date—August 4, 1914—was at a ground rent, or some other abnormally low rent. In such a case, unless provision had been made to the contrary, that very low rent would have become the standard rent. The object of s. 12, sub-s. 7 was to prevent its becoming the standard rent, for this would have been most unfair on the head landlord ; but, on the other hand, to provide that, if there were a sub-tenancy not at a ground rent, but at a commercial rack rent, the sub-tenant should be able to treat the rent at which he held as the standard rent, and the head rent should be ignored in fixing that standard rent. That, I think, is plainly the object of sub-s. 7 ; but its wording may well be such that it effects a number of other consequences which were perhaps uncontemplated and unintended by the draftsman.

In the present case the rent payable by the head lessee and her two successive assigns was in fact less than two-thirds of the rateable value. The Act therefore applies in respect of the dwelling-house as if the head lease had never existed. Section 15, sub-s. 3 is part of the Act, and, if the head tenancy had never existed, the condition precedent to the application of s. 15, sub-s. 3 must necessarily go unfulfilled—I mean the condition precedent set out in its first two lines : " where the " interest of a tenant of a dwelling-house to which this Act " applies is determined." The de facto head tenant must be

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deemed never in law to have had the "interest of a tenant of "a dwelling-house," and, if he never had such an interest, the interest in question cannot have been "determined," for a thing cannot die if it has never been born. This seems to me an insurmountable obstacle in the way of the otherwise most attractive argument presented by Mr. Sofer for the sub-tenant.

I agree with him that the result which I have indicated was almost certainly unintended. I agree with him that it is unjust, and that it does nothing to promote the objects of this body of legislation, which are too well-known to need re-statement here. But it seems to me to be an ineluctable conclusion when one considers the actual wording of these two provisions. True, s. 12, sub-s. 7 is, in itself, a perfectly reasonable provision to prevent low ground rents paid on building leases which were being paid at the material date—August 4, 1914—from being stereotyped as the standard rent. The observations of Scrutton L.J. in *Brookes* v. *Liffen* (1) make this point very clear. But the effect of the impact of s. 12 sub-s. 7 on s. 15, sub-s. 3 is most unreasonable: there is no reason why the sub-lessee at a rack rent from a head lessee who pays a ground rent to his landlord should be any the less entitled to protection than a sub-lessee who holds from a head lessee who pays a rack rent to his landlord. The one sub-tenant is as meritorious as the other, but the wording of the two subsections leads to a distinction between them as arbitrary as that which ordains that, of two women who shall be grinding at the mill, the one shall be taken and the other left.

Mr. Sofer cited a number of authorities, including *Wright* v. *Arnold* (2) and *Cow* v. *Casey* (3). Those two cases, so far as relevant, decide that where premises, part of which have been sub-let, are not a dwelling-house to which the Act applies at all, for instance, if the rateable value is over 100*l*., then s. 15, sub-s. 3 confers no protection on the sub-tenant. But Mr. Sofer appeared to me to deduce from this that, provided that premises were a dwelling-house to which the Act applies, that was all that mattered and that the protection of s. 15, sub-s. 3 would, in such an event, automatically be attracted. But this does not, in my judgment, follow. There are two distinct prerequisites set out in the first two lines of s. 15, sub-s. 3 for the application of that sub-section: first, the

(1) [1928] 2 K. B. 347, 349.

(2) [1947] K. B. 280.

(3) [1949] 1 K. B. 474.

dwelling-house must be one to which the Act applies, and, secondly, the head lessee must have the interest of a tenant in that dwelling-house; that is to say, he must have a tenancy. But by s. 12, sub-s. 7, if the rent of such a tenancy is at less than two-thirds of the rateable value, it must be deemed not to exist and never to have existed. Therefore, no one had the interest of a tenant at any time in these premises; nor could any such interest have been determined; nor, consequently, could s. 15, sub-s. 3 apply.

If the language of Lord Greene M.R., in *Cow* v. *Casey* (1) is carefully examined, I think it will appear that he had these two cumulative and distinct requirements of s. 15, sub-s. 3 in mind, and that he was not merely inquiring whether the requirement that the dwelling-house should be one to which the Act applies was satisfied. Take, for instance, the passage where he said (2): " But the sub-section is limited to a case " where the tenant whose tenancy is determined, that is to say, " the head tenant, is tenant of a dwelling-house to which the " Act applies. I should have thought that is clearly what the " Act means. The company was not a tenant of a dwelling-" house to which the Act applies; it was tenant of a dwelling-" house to which the Act did not apply, and the fact that they " had granted a sub-tenancy of this flat could not alter that " circumstance." Mr. Sofer to my mind extracts no material reinforcement in meeting this central objection from other cases which he cited, such as *Watson* v. *Saunders-Roe Ld.* (3). In that case the main issue, though not the sole issue, was whether the premises were lawfully sublet. In the present case ex concessis they were. Nor do I think that Mr. Sofer's attempted trichotomy of the first two lines of s. 15, sub-s. 3 (which certainly derives no support from their punctuation) carries him any further.

Mr. Sofer relies also on the wording of s. 15, sub-s. 3, which differs somewhat from that of s. 2, sub-s. 3 of the Landlord and Tenant (Rent Control) Act, 1949; but, before that Act was passed, the construction of the material provision of the Act of 1920 seems to me to have been too clear for any subtle construction, and I do not see how it can be altered or any light be thrown on it by the enactment of the later statute.

Finally, Mr. Sofer painted an alarming picture of the consequences which might ensue if the county court judge's

(1) [1949] 1 K. B. 474.
(2) Ibid. 480.
(3) [1947] K. B. 437.

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construction were upheld. Such an argument is tolerably clear, but, for what it is worth, it was to the effect that long building leases at ground rents in London will be falling in in great numbers in the next decade. The lessees at ground rents have let to sub-tenants at commercial rack rents. When the head leases of the builders fall in, if the county court judge's view is affirmed and the sub-tenants become expellable, the landlords will be free, having expelled them, to re-let at exorbitant rents, untrammelled by the restrictions of the Acts. I do not feel that this bug-bear has any reality : the effect of s. 15, sub-s. 3 and s. 12, sub-s. 7 combined would, no doubt, be, if the view I have taken of them is right, that the existing sub-tenants could in those cases be ejected. But, if they were ejected, the rents at which they held would become the standard rents of the houses in question. There would be no question of the landlords being able to re-let at their own sweet will at any rent they could obtain. I think that that disposes of all the essential arguments. In my view, the appeal must be dismissed.

COHEN L.J. I agree.

ROXBURGH J. I agree on all points except one, as to which I should like to reserve my view, and that is whether the result at which we have arrived is wholly unintended—a matter which cannot affect the question of construction. Many of these leases at ground rents are long leases, at the end of which premises require re-building ; and it may well be that Parliament thought it right that a landlord who wanted to re-build at the end of a long ground lease should not be encumbered by sub-tenants who had a statutory right to remain in occupation. I am not saying that that is so ; I merely wish to reserve my view on the matter.

Appeal dismissed.

Solicitors: *Tarlo, Lyons & Co; Montagu's and Cox and Cardale.*

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Landlord and tenant—Breach of repairing covenant—Termination of tenancy—Diminution in value of reversion—Landlord's project to pull down premises at or shortly after termination of tenancy—Meaning of "intention"—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

By s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927: "And in particular no damage shall be recovered for a breach "of any such covenant or agreement to leave or put premises in "repair at the termination of a lease, if it is shown that the "premises, in whatever state of repair they might be, would "at or shortly after the termination of the tenancy have been "or be pulled down, or such structural alterations made therein "as would render valueless the repairs covered by the covenant "or agreement." Lord Greene M.R. in *Salisbury* (*Marquess*) v. *Gilmore* [1942] 2 K. B. 38, in applying these words of the subsection to that case, said that, if it were shown by the tenant (on whom rested the onus) that before the crucial date, that of the termination of the letting, the landlord had "decided" to pull down the building and that this "intention" was still existing at that date, the requirements of this part of the sub-section would be satisfied.

On what was meant by the landlord's "decision" or "intention" the court now

Held, that a firm intention—a decision—on the part of the landlord, at the relevant date, must be proved by the tenant. It must be shown that the landlord had made up his mind and that his project had moved out of the zone of contemplation—the sphere of the tentative, the provisional and the exploratory—and had moved into the valley of decision.

Per Asquith L.J. It must be shown that the landlord had decided, in so far as in him lay, to bring about the demolition of the premises and that he had a reasonable prospect of being able to bring about that demolition by his own act of volition. A man could not be said to "intend" a particular result if its occurrence, though it might not be wholly uninfluenced by his will, were dependent on so many other influences, accidents and cross-currents of circumstance that, not merely was it quite likely not to be achieved at all, but, if it were achieved, his volition would have been no more than a minor agency, collaborating with, or not thwarted by, the factors which predominantly determined its occurrence. If there were a sufficiently formidable succession of fences to be surmounted before the result at which he aimed could be achieved, it might well be unmeaning to say that he intended that result.

Not only was proof of "intention" unsatisfied if the person said to "intend" had too many hurdles to overcome or too little control of events: the term was equally inappropriate, if, at the material date, that person was in effect not deciding to proceed, but was feeling his way and reserving his decision until he should be in possession of financial data sufficient to enable him to determine whether the project would be commercially worth while.

Decision of Lord Goddard C.J. [1950] 1 K. B. 267, reversed on his construction of correspondence to the effect that, at the termination of a certain lease, the landlord "intended" to pull down the premises let.

APPEAL from Lord Goddard C.J. (1.)

In the first part of his considered and written judgment Cohen L. J. set out the facts and material correspondence of the case in these words: By an agreement dated June 10, 1943, the plaintiff, Lady Gabriella Cunliffe, let to the defendant, Mr. H. Goodman, a manufacturing chemist, premises known as No. 1 Abdale Road, Shepherd's Bush, for the duration of the war at a yearly rent of 150*l.*, subject to the proviso that either party might terminate the agreement on giving three months' notice in writing after the cessation of hostilities. The material undertakings on the part of the tenant were in the following terms: "(4.) To keep the said premises in "good and sufficient repair during the said term. And in "particular will reinstate the premises at the end of the term "hereby granted as a private dwelling-house and replace "all the fixtures removed during the tenancy except the bath "and wash basin which were handed over to the landlord "at the commencement of the tenancy."

"(10.) During the tenancy to keep and on the expiration "or sooner determination of the tenancy quietly to deliver "up to the landlord the premises in a good and tenantable "state of repair and condition together with all fixtures "(except any tenant's fixtures)."

The tenancy was duly determined on November 30, 1945, and on May 8, 1946, the plaintiff brought this action for breaches of the undertakings for repair contained in the agreement of June 10, 1943. At the trial before the Lord Chief Justice breaches of covenant were admitted, and it was agreed that, if damages were payable in the events which happened, they were properly assessed at the sum of 565*l.* The defendant, however, contended that he was relieved from liability under the provisions of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, which so far as material provides as follows: The first part of the sub-section provides that damages for breaches of covenants to keep or put premises in repair should in no case exceed the amount by which the value of the reversion

(1) [1950] 1 K. B. 267.

in the premises was diminished owing to the breaches of covenant, and then continues, " and in particular no damage " shall be recovered for a breach of any such covenant or " agreement to leave or put premises in repair at the " termination of a lease, if it is shown that the premises, in " whatever state of repair they might be, would at or shortly " after the termination of the tenancy have been or be pulled " down, or such structural alterations made therein as would " render valueless the repairs covered by the covenant or " agreement."

The Lord Chief Justice upheld the defendant's contention, being of opinion that the present case was indistinguishable from a decision of this court in *Salisbury* (*Marquess*) v. *Gilmore* (1). That case, he considered, decided that if, at the time when a tenant leaves the premises and the lease comes to an end, the intention of the landlord is to pull down the premises, the landlord cannot by changing his mind afterwards recover damages for the breach. He found that intention proved to exist in the present case at the material date, November 30, 1945, and accordingly, he dismissed the action (2). From that decision the plaintiff appealed.

The evidence on which the Lord Chief Justice found the intention to pull down proved was documentary. The plaintiff was not called, nor was the architect whom she had consulted as to the development of the property. The only witness was a surveyor, one French, whose evidence was directed to showing that the scheme for rebuilding would give no adequate return on the capital involved and that it was, therefore, financially impracticable. The Lord Chief Justice did not give weight to that evidence and based his conclusion entirely on the correspondence. The plaintiff's architect's letter to the plaintiff, dated June 3, 1943, indicates that there had been some discussion as to the development of the property; but as, a week later, the premises were let to the defendant I do not think any importance can be attached to this letter.

On May 25, 1945, the plaintiff, by her then solicitors, gave notice to the defendant determining the tenancy, and on June 21 she refused an extension of it, being only willing to allow him to remain after September 29 on a monthly tenancy.

On June 26, 1945, the architect wrote thus to the plaintiff as to the development of the property : " Further to my visit " to you on Saturday last, June 23, I think it will be to our

(1) [1942] 2 K. B. 38.

(2) [1950] 1 K. B. 267.

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"mutual convenience if the result of what passed between us "were put on record, and I shall be glad if you will be kind "enough to confirm it as soon as convenient, so that I may "take these matters in hand without delay. I understand "that you want me to proceed with a scheme for a block of "flats or maisonettes, to be put up on your property in "Abdale Road, on the lines, more or less, of my sketch scheme "made for you in 1939 . . . . You also wish me to examine "the possibilities of re-developing your property in Notting "Hill Gate and to prepare an entire scheme sufficient to give "an approximate idea of their extent structurally as well as "financially . . . ." The letter referred to the question of fees and continued as follows: "For taking instructions, "and preparing preliminary sketch plans to illustrate the "possibilities of a site or the likely cost of scheme: in "accordance with the work involved, and not more than "1 per cent. of the estimated cost. (2.) For preparing "drawings and particulars sufficient to enable quantities "to be prepared by an independent quantity surveyor or a "tender obtained: 2 per cent. of the cost of the scheme. "(3.) For obtaining tenders, preparing contract, selecting "and instructing consultants (if any), furnishing the contractor "with all details necessary for the proper carrying out of the "works, general supervision, issuing certificates for payment "and passing and certifying accounts: 6 per cent. of the cost "of the scheme, to be paid in stages as the work proceeds."

On June 28, 1945, the architect wrote again to the plaintiff stating that a rough estimate of the cost of the scheme would be 10,000*l.* or thereabouts, that the actual amount could only be determined when the tenders came in, but that a fair judgment could generally be formed when the scheme had taken definite shape.

To those letters the plaintiff replied on June 29, 1945: "I thank you for your letters dated the 26th and 28th instant, "giving me rough details of the proposed schemes for a block "of flats or maisonettes to be put up on my properties at "Abdale Road and Notting Hill Gate. I note your remarks "regarding your fees and I am prepared to let you commence" —I stress the word "commence"—"the schemes for both "estates, and prepare preliminary plans"—again I stress the word "preliminary"—"and pay the scale of charges in "accordance with the scale of charges issued by the Royal

" Institute of British Architects, subject to your obtaining " sanction to carry out the plan by the London County Council, " and a licence to commence the work. In other words, " and I wish to make it quite understood and clear to you, " I am prepared to pay your fees, but the scheme must be " sanctioned by the authorities concerned. If you are " prepared to commence your plans on this understanding " and submit them to the London County Council, etc., and " as soon as you obtain their sanction and licence I will pay " your fees, but on no other conditions."

The architect replied on July 5 that his fees could not be made contingent on the issue of licences, as they depended on things like availability of labour and government policy which were not within his control. The plaintiff and her architect then met, and on July 21 the plaintiff wrote to him: " With " reference to our recent conversation, I request you to carry " on with the scheme for plans of 1 Abdale Road, subject " to the conditions as stated in my previous letter." She followed up this letter with a further letter of July 24: " In " reply to your letter of July 5, I agree that the first instalment " of your fees shall not be made dependent on the issue of a " building licence, but shall be due immediately upon your " plans obtaining the approval of the London County Council " and of the local authority." The architect then approached first Hammersmith Borough Council, who replied that they would be unable to consider applications until the necessary consents had been obtained from the town-planning authority. the London County Council. Accordingly, on August 21 1945, he made application to that council for the approval of the plans of a proposed scheme for six maisonnette flats.

On September 7, 1945, the plaintiff by her solicitors gave definite notice determining the defendant's tenancy on October 29, 1945. On September 12 the defendant by his solicitors inquired whether the plaintiff was willing to consider an offer for the premises, but on September 19 she replied that " her circumstances would not allow her to extend the " tenancy," and asked what would be the earliest date on which the defendant could give possession if he could not vacate on October 29.

On October 8, 1945, the London County Council turned down the scheme. Their letter conveying the decision contains the following paragraph: " In connexion therewith I have to " inform you that the council hereby refuses its permission "under the above-mentioned order in respect of this application for the reasons that the site cover and density are "excessive and the angular limit at the rear would be "infringed. In view of this decision under the Town and "Country Planning Acts, the questions arising under the "London Building Acts and by-laws have not been considered."

The Lord Chief Justice summed up his views on the correspondence up to this date by saying: "I have not the "least doubt in the present case that certainly up to October 11, "1945, the plaintiff was intending to pull down this old "building and erect another in its place." I am not sure that some qualification ought not to be made on this finding, since it would seem that the plaintiff by her letter of June 29, the terms of which were confirmed in her letter of July 21, had confined her approval to the preparation of the preliminary plans and the submission thereof to the appropriate authorities with a view to obtaining sanction of the plans and a licence to commence work. It would, I think, have still been open to the plaintiff to stop the matter, and not go on to the third stage mentioned in the architect's letter of June 26, without committing any breach of contract with him. Be that as it may, had the matter rested on the letter of October 8, it would have been impossible, I think, to infer a definite intention on the plaintiff's part to rebuild still continuing on November 30, 1945. The matter does not, however, rest there.

The plaintiff persisted in her intention to get the defendant out of the premises, and on October 26 his solicitors wrote that he could say definitely that he would be out by November 30. The plaintiff then apparently appointed a surveyor, French, to act for her in the matter of dilapidations, and on November 29, he wrote to the defendant's surveyors, Messrs. Ryland Jones & Co., a letter as follows: "Further "to our interview with Mr. Jones this morning together with "your client, Mr. Goodman, I shall be glad if you will let "me have a complete list of the work which has been carried "out during your client's occupation and a list of the items "which he considers are war damage. I propose to make "my survey at the end of next week and should like to have "these lists not later than Wednesday morning next."

That was the last letter before the vital date, November 30, 1945, and there was in the correspondence between October 8 and November 30 no indication that anything was being done in pursuance of an intention to rebuild, if in fact that intention still persisted. However, on December 28 the architect submitted a revised scheme to the London County Council for a terrace of three houses.

It appears that before February 27, 1946, a firm of builders, Menhenett & Son, applied to Hammersmith Borough Council, for permission to do repairs on the premises. On February 27, that application was refused. On March 1, the builders protested against the refusal, saying that the building though old was a good one and well suited for certain types of business.

On March 1, 1946, the plaintiff's solicitor wrote to the defendant's solicitor about dilapidations, saying that he hoped that as soon as better weather permitted, the work could be put in hand. Correspondence as to dilapidations continued for some time.

On March 22 the London County Council, as the town-planning authority, approved the new scheme, being a plan for a terrace of three houses, subject to certain conditions. The architect then saw the plaintiff, and on April 9 wrote to her a letter which contains the following two paragraphs: "Further to our discussion at your house last Saturday, "April 6, I wish to thank you for your cheque for 50*l.* in "respect of professional services rendered in connexion with "the above." The "above" is No. 1 Abdale Road. "I confirm "your instructions to proceed with this scheme as approved "by the London County Council on March 22, 1946, and to apply "for a building licence, negotiate a mortgage and obtain "a tender for the work. In regard to the financial statement "I left with you, this is now superseded by your desire to "raise mortgages solely on the Abdale Road scheme, without "encumbrancing any other securities, and I shall endeavour "to let you have a revised financial statement in due course."

At the same time he took other steps. He approached Hammersmith Borough Council, and in his letter said, "since then, I have gone further into the matter of figures "and, although the building costs are likely to be higher "than I first hoped, it seems probable that the scheme will "prove of sufficient financial interest to warrant proceeding "with, and I shall be glad if you can be so kind as to confirm "to me your assessment of the rates, including water, at "36*l.* 7*s.* 6*d.*, at the current rate in the pound, and

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"also your assurance that it is not intended to impose any "restrictions upon the rent to be charged. As I stated at "our meeting, it is very unlikely that my client will wish to "sell this property during the next few years." Then he proceeds to go into calculations, suggesting that he should be allowed a higher maximum price. These questions were asked because the appropriate authority had power to impose restrictions as to rent and selling price as a condition of granting a licence. The question whether such restrictions would be imposed was obviously material in deciding whether the scheme would be financially worth proceeding with.

The architect also wrote to a firm of builders for a rough estimate of the cost. He never obtained from the borough council any confirmation that there would be no restriction on rent or any definite maximum selling price, but on May 8 the builders gave a rough quotation of 3,530*l.*

By this time the plaintiff was getting nervous as to the position, and on May 16 her solicitor wrote to the architect a letter which contained the following paragraphs: "Lady "Cunliffe has been in to see me today, and she asks me to "inquire as to the position with regard to the matters "mentioned in your letter of April 9 last. You will appreciate "that time is going on and Lady Cunliffe is losing money "all the time. It is urgent, therefore, that matters are not "delayed or held up any longer than is absolutely necessary. "Lady Cunliffe informs me that she did not receive the financial "statement, which you mentioned in your letter you would "endeavour to send on."

On the next day the architect wrote to the solicitor that he was trying to arrange a mortgage, and to that end he applied to a building society for a loan. On May 20, 1946, the solicitor again wrote to the architect stating that the plaintiff must have full details and information or she must cancel all negotiations.

Undeterred, the architect on May 21, submitted plans and outline specification to the borough engineer. On May 23, however, the solicitor wrote to the architect as follows: "Lady Cunliffe complains that you have acted without "instructions. You apparently prepared plans (which she "did not even know about) and then, without authority—she "has not yet approved the scheme—applied for a licence. "Next, you have apparently obtained an estimate from "Messrs. Fairweather for the work, and have gone ahead, "without even telling my client the amount of such "estimate. In the circumstances, Lady Cunliffe disclaims "all responsibility in the matter and will not proceed further."

On May 25, the architect replied maintaining that he had acted with the plaintiff's authority throughout; but the plaintiff disputed that statement and determined all authority in the architect to act on her behalf.

Lloyd-Jones K.C. and *L. F. Sturge* for the plaintiff landlord. For the tenant to escape the consequences of his breach of undertaking to repair, the tenant must prove, the onus of proof being on him, that at the termination of the lease (in this case on November 30, 1945), the landlord has "decided" to pull down the building let. In *Salisbury* (*Marquess*) v. *Gilmore and Another* (1) Lord Greene M.R. said that "if before that date arrives"—the date of the termination of the lease—"the landlord has decided to pull down the "building and . . . . this intention is still existing at that "date, the requirements of the sub-section, in my opinion, "are satisfied." The operative word is "decided": no tentative or conditional intention will suffice. It is plain from this correspondence that the landlord only proposed to pull down No. 1 Abdale Road, Shepherd's Bush, if she could rebuild the premises with the permission of the authorities concerned under a scheme which would result in a commercial profit to herself. To neither scheme had she obtained all the necessary consents from local authorities, and the data for assessing the possibility of rebuilding at a profit to herself had never been seen by her.

The date of the termination of the lease in the *Marquess of Salisbury's* case (1) was September 29, 1939. At that time the war-time restrictions with regard to building were not in force, as both Lord Greene M.R. (2) and Goddard L.J. (3) pointed out. The facts that the plaintiff had to obtain the approval of a scheme by the London County Council as town-planning authority and a licence from the Hammersmith Borough Council and that the council could fix a maximum rent and/or a selling price on the building re-erected serve to distinguish this case from that of *Salisbury* (*Marquess*) v. *Gilmore* (1), and to show that the plaintiff could not have

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(1) [1942] 2 K. B. 38, 46.
(2) Ibid. 44.
(3) Ibid. 53.

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arrived at any decision to pull this building down and to rebuild. At the most she had under consideration a project under contemplation which had not become a plan or even a definite proposal. The evidence in the case, which was documentary, did not justify the conclusion that on November 30, 1945, the landlord had decided or indeed had arrived at a definite intention to pull down the premises. [Counsel did not press his argument that the protection afforded to the defendant by the sub-section did not apply to the case of his undertaking to reinstate the premises at the end of the term as a private dwelling-house. The Lord Chief Justice had construed such reinstatement as included in the word "repair."]

Salt K.C. and *C. D. Myles* for the tenant. Section 18, sub-s. 1 does not use the word "intention" or "decision," but it necessarily imports an intention or decision of a local authority or requisitioning authority or of the immediate or next proximate landlord to demolish, with or without an ulterior idea of re-building. That intention need not be irrevocable provided that it subsists at the material date. It may subsequently be revoked or frustrated. Even up to the material date (the determination of the tenancy in this case was November 30, 1945, and in *Salisbury* (*Marquess*) v. *Gilmore* (1) it was September 29, 1939), the landlord, or other person intending to rebuild after pulling down, must face the possibility of his will being frustrated, not merely by circumstances, but also by legal controls and the volition of those who exercise them. The extent of the legal controls was no doubt less far-reaching on September 29, 1939, than on November 30, 1945, but they existed, and had to be surmounted or risked. [Counsel referred to the London Building Act, 1894, the Town and Country Planning Acts, s. 84 of the Law of Property Act, 1925, *In re Forsey and Hollebone's Contract* (2) and *A.-G.* v. *Barnes Corporation and Ranalagh Club Ld.* (3).]

In the present case the plaintiff had, despite legal curbs on her liberty of action, taken a decision before November 30, 1945, to pull down and rebuild; and, when checked in her first scheme by the county council's refusal to sanction that density of building, she returned to the charge with a modified scheme for which her architect and agent, with her authority, obtained planning permission from the county council some four or five months after November 30, 1945. It could not then be expected that the Hammersmith Borough Council's licence would be withheld, or that its conditions would be unreasonable. The Lord Chief Justice was right in holding that the plaintiff had before, at, and after November 30, 1945, a fixed intention to pull down and rebuild. She did not go into the witness box to deny this inference, or to aver that she could not finance either scheme in any of the ways open to her.

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(1) [1942] 2 K. B. 38.
(2) [1927] 2 Ch. 379, 384.
(3) [1939] Ch. 110, 127.

[ASQUITH L.J. Has "intention" or "decision" any reality where a person is hedged about with so many legal obstructions which he has to surmount before he can make his wish prevail?]

Yes. Once he has declared a firm intention, he must be taken to mean to carry it out. The onus is primarily on the tenant, but he is aided by that presumption; and once he has shown the landlord's formed intention the burden must shift on to the landlord to prove that insurmountable obstruction had thwarted him at the material date. It would have been easy for the plaintiff to give evidence to that effect, if that had been the case; but she elected to rely only on the correspondence; and the inference at the trial was rightly drawn against her. The correspondence between the plaintiff and the defendant concerning dilapidations was not inconsistent with her decision or intention to pull down "at or shortly after the termination of the "tenancy." That was only a precaution on the part of the plaintiff to keep open a locus poenitentiae in case she should revoke her intention after the material date. In fact she persisted in it.

The Lord Chief Justice rightly applied the true ratio decidendi in *Salisbury* (*Marquess*) v. *Gilmore* (1).

Lloyd-Jones K.C. replied.

Cur. adv. vult.

March 7. COHEN L.J. read a judgment in which he stated the facts in the terms above set out, and continued: The Lord Chief Justice's views on the correspondence which I have read are summed up in the following paragraph of his judgment: "No suggestion has been made here to day that "he acted without authority; it is almost impossible to "suggest that he has in the face of this correspondence.

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(1) [1942] 2 K. B. 38, 46.

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"The letters clearly show that not only had this lady before "notice to quit intended to build, but, after the termination "of the tenancy, she still retained that intention and actively "pursued her negotiations for that purpose, and through "her architect and solicitor was taking all necessary steps "in that intention."

Taking this view of the correspondence, it followed that, in applying the decision of *Salisbury* (*Marquess*) v. *Gilmore* (1), the Lord Chief Justice held that the defendant had brought himself within the terms of sub-s. 1 of s. 18 of the Landlord and Tenant Act, 1927, and was entitled to judgment. Mr. Lloyd-Jones for the plaintiff has contended (1.) that the Lord Chief Justice has misconstrued the decision in the *Salisbury* case (1); (2.) that he was wrong in finding on the correspondence a definite intention on the part of the plaintiff persisting at November 30, 1945, to rebuild the premises.

In order to deal with the first argument I must refer to the report of the *Salisbury* case (1). The facts are sufficiently set out in the first paragraph of the headnote in these terms: "In 1926 the first plaintiff demised to the first defendant, G., "premises for a term of fourteen years from September 29, "1925, by a lease which contained a tenant's covenant to "leave the premises in repair at the expiration of the term. "The second defendant, M., was the assignee of the term. "In 1937 M. asked for a renewal of the lease but was informed "that the plaintiffs (who had become the landlords in 1936) "intended to pull down the premises at the expiration of the "lease. On September 29, 1939, M. vacated the premises "and left them out of repair, being still under the impression "that the premises were being pulled down. It was not till "he received a letter dated December 5, 1939, from the "plaintiffs' agents claiming damages for breach of covenant "that he became aware that the scheme for forthwith pulling "down and rebuilding the premises had been abandoned."

It is to be observed that in that case the plaintiffs had given to the defendants definite notice of their intention to pull down the premises and had not withdrawn that notice at the material date. Moreover, although no doubt local authorities had certain powers under the London Building Acts and the Town Planning Acts, the war-time restrictions were not in force by the material date.

Lord Greene M. R. in his judgment stated that the point of time in relation to which the fate of the building was to be considered was the termination of the lease. He also recognized that the onus of proving the intended fate of the building was on the tenant, and that he had to discharge that onus at a date necessarily subsequent to the termination of the lease. He summed up his conclusions as to how the tenant was to discharge the onus which rested on him in these words (1): "I am of opinion that if the tenant can show "at the trial that at the moment when the covenant fell to "be performed the building was one which was going to be "pulled down at or shortly after the termination of the "tenancy, he is entitled to the relief which the sub-section "gives. The question then arises, what is the test by which "the fate of the building as at the relevant date—namely, "the date at which the covenant ought to be performed—is "to be ascertained? I have already pointed out that a "building may be destined for demolition either because "the landlord has so determined or because some extraneous "authority has decided to exercise its powers in that behalf. "I have also pointed out that the crucial date is the date of "the termination of the lease. Once that date has passed, "the tenant is no longer in a position to fulfil his covenant; "and if it is shown that before that date arrives the landlord "has decided to pull down the building and that this intention "is still existing at that date, the requirements of the sub-"section are, in my opinion, satisfied." He then held on the facts of the case that the tenant had discharged the onus which rested on him, and, therefore, found it unnecessary to consider either (*a*) whether the plaintiffs by their conduct had debarred themselves from asserting that before the material date they had abandoned their intention to pull down the building, or (*b*) whether any damage to the reversion had been proved.

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(1) [1942] 2 K. B. 38.

MacKinnon L.J. decided both these points in favour of the defendants, and did not express any opinion as to the test to be applied in deciding whether the tenant had discharged the onus which rested on him.

Goddard L.J.—as I read his judgment—agreed with the Master of the Rolls in thinking that intention was the test, an opinion which he repeated in the present case.

In the result, I respectfully agree with the Lord Chief Justice that the ratio decidendi of the decision in the *Salisbury* case (1)

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(1) [1942] 2 K. B. 38, 46.

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is to be found in the passages from the judgment of the Master of the Rolls which I have read.

Mr. Lloyd-Jones, however, says that in that passage Lord Greene, M.R., was distinguishing between "intention" and "decision" and was laying down that it is not enough to prove an intention: one must show a decision. I do not so read his judgment. I do not think that the Master of the Rolls was distinguishing between "intention" and "decision." On referring to the Shorter Oxford English Dictionary, I find under "decision" para. (2.) the words "the making up of "one's mind," and under "intention" para. (5.) "that which "is intended: a purpose." I think that what the Master of the Rolls was laying down was that what the tenant has to prove is the making up of the landlord's mind to carry out the purpose of pulling down the premises. Such a decision or intention might be revocable, but "revocable" must be distinguished from "provisional."

Mr. Lloyd-Jones next argued that the fact that the wartime building restrictions are now in force was sufficient to distinguish this case from the *Salisbury* case (1). He pointed out that both the Master of the Rolls and Goddard L.J. in the *Salisbury* case (2) emphasized the fact that such restrictions were not in force at the date material (in that case September 29, 1939), Goddard L.J. saying, : "He" (Lord Salisbury) "never "applied his mind to the question before October 5, and until "that date his intention was unchanged, nor was there any "enactment or regulation then in force which could have "prevented the carrying out of the scheme." I do not however read the judgments in the *Salisbury* case (1) as holding that, had the regulations been in force, the decision would necessarily have been different. I think that they were merely reserving the question.

In the present case our attention has not been directed to any regulation prohibiting absolutely buildings of the character proposed on behalf of the plaintiff. The regulations only make building without licence illegal, and enable the authority to impose conditions if they grant a licence. The existence of such regulations is no doubt a factor to be borne in mind in deciding what was the intention of the landlord at the material date, but it is not conclusive on the point.

Mr. Lloyd-Jones' third point—and it is the point which has caused me most difficulty—was that the evidence in this

(1) [1942] 2 K. B. 38, 46.
(2) Ibid. 44, 53.

case—which was purely documentary—did not justify the Lord Chief Justice's conclusion that the plaintiff on November 30, 1945, had a definite intention to pull down the premises. Mr. Lloyd-Jones stresses the following points : (1.) the qualified extent of the authority given by the plaintiff to her architect to proceed with the first scheme, there being, as Mr. Lloyd-Jones said, no authority to obtain tenders or place building contracts ; (2.) the rejection of the first scheme ; (3.) the instructions to the plaintiff's surveyor after the first scheme had been rejected to settle the question of dilapidations with the defendant's surveyor ; (4.) the absence of any written evidence after October 8 and before November 30 of any intention to proceed with any rebuilding scheme ; (5.) the application by the plaintiff's builder in February, 1946, for permission to execute repairs ; (6.) the evidence of the plaintiff's anxiety not to commit herself too far unless she were assured of the requisite finance.

Such evidence was, it is said, to be found : (*a*) in the architect's letter of June 26, 1945, where he offered his assistance in the matter of finding finance ; (*b*) in the plaintiff's letter of June 29, where she limits the extent of the authority which she gives to the architect to proceed with the scheme ; (*c*) in her anxiety throughout for a financial statement as to the possibility of the second scheme ; (*d*) in the architect's letter to the valuation officer of the April 9 which clearly indicated that the scheme must show a financial benefit to his client if she was to proceed with it and that whether it would show that benefit would depend on satisfactory assurances as to permitted rent and selling price—assurances which were never given ; (*e*) the insistence by the plaintiff throughout on her right to recover dilapidations from the defendant.

Having regard to all these points, Mr. Lloyd-Jones said that the proper inference was that the plaintiff's intention to rebuild was conditional on licences being obtained and satisfactory arrangements being made for the provision of finance, and that she had not reached a final decision on the point on November 30, 1945. Mr. Lloyd-Jones said that in any event the onus was on the defendant to prove a definite intention, and that that onus had not been discharged.

Mr. Salt and Mr. Myles, for the defendant, argued that the conclusion of the Lord Chief Justice was justified by the correspondence. They stressed these points :—(1.) The decision of the landlord need not be irrevocable. (2.) The plaintiff had taken a definite decision to rebuild when she approved the lodging by the architect of the first application. Had that application not been rejected before November 30, the defendant would plainly have been entitled to succeed. Had she been asked on November 30 what was to happen if the plans were rejected, she would have replied, "I will submit "fresh ones". (3.) There was no evidence that she had changed her mind by November 30. (4.) Although there was no direct evidence that she had instructed the architect to prepare a new scheme before November 30, it was a fair inference, from her actions in insisting on the defendant's giving possession of the premises and in allowing the architect to proceed with the second scheme after it had passed the London County Council, that he was acting throughout with her authority. (5.) The fact that she pressed on with the dilapidations claim and indeed instructed surveyors in connexion with it on November 29, the very eve of the material date in this case, is not sufficient to displace the inference which the Lord Chief Justice rightly drew from her other actions in relation to the premises.

During the course of the discussion my mind has fluctuated as between these two arguments, but on the whole I have come to the conclusion that the plaintiff is entitled to succeed. It is, I think, clear that the intention which must be proved against the landlord is a definite intention. This intention may be revocable, but it must not be provisional. Reading the correspondence as a whole, I have come to the conclusion that the plaintiff never reached more than a provisional decision. She would obviously not rebuild unless the proposed scheme would provide an adequate return on the capital she would have to sink in it. It was plain that she could not reach a judgment on this point until she knew (*a*) what conditions the authorities would impose as to rent, etc., (*b*) what the proposed buildings would cost, and (*c*) what interest she would have to pay in order to finance the scheme. The financial aspect was plainly present to her mind throughout, and, reading the correspondence as a whole, I find it impossible to conclude that the defendant has discharged the onus which rests on him of proving that before November 30, 1945, the plaintiff had decided to pull down the building and that that intention was still existing at that date. For these reasons I would allow the appeal.

Before parting with the case, I should add that before the Lord Chief Justice the plaintiff raised the subsidiary point that in any event s. 18, sub-s. 1, had no relation to the covenant to reinstate the premises as a private dwelling-house. The Lord Chief Justice came to the conclusion that he ought to construe this reinstatement as part of the word "repair." Before us Mr. Lloyd-Jones decided not to press the argument that the protection afforded to the defendant by the subsection did not apply to the case of his undertaking to reinstate the premises at the end of the term as a private dwelling-house.

ASQUITH, L.J. I agree, and will only add a few sentences out of respect for the Lord Chief Justice from whose judgment we feel constrained to differ. The question to be answered is whether the defendant (on whom the onus lies) has proved that the plaintiff, on November 30, 1945 "intended" to pull down the premises on this site. This question is in my view one of fact. If the plaintiff did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was *no* evidence of a positive "intention," or that the word "intention" was incapable as a matter of construction of applying to anything so tentative, and so indefinite. An "intention" to my mind connotes a state of affairs which the party "intending"—I will call him X—does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.

X cannot, with any due regard to the English language, be said to "intend" a result which is wholly beyond the control of his will. He cannot "intend" that it shall be a fine day tomorrow: at most he can hope or desire or pray that it will. Nor, short of this, can X be said to "intend" a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X.'s volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence. If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X "intended" that result.

Here there were a number of such fences. The approval of the London County Council, as the town-planning authority for London, had to be obtained, and was refused in respect of the first rebuilding plan. A building licence had to be obtained from Hammersmith Borough Council. The first plan never reached the stage at which such a licence could usefully be applied for. As to either plan, a licence, if forthcoming, might have been granted on terms, and those terms might have deprived the project of all commercial attraction—deprived it of the character of a "business proposition." Such licences are often granted conditionally on a maximum selling price for the structure as rebuilt, or—if it be not sold, but let—conditionally on a maximum rent: and in respect of the second scheme a maximum rent of an unattractive level was in fact proposed by the local authority.

This leads me to the second point bearing on the existence in this case of "intention" as opposed to mere contemplation. Not merely is the term "intention" unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while.

A purpose so qualified and suspended does not in my view amount to an "intention" or "decision" within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision. In the present case it seems to me that (assuming that the plaintiff was, both before and after November 30, 1945, disposed to demolish and rebuild if she could do so on remunerative terms) she never reached, in respect of the first scheme, a stage at which she could decide on its commercial merits; nor, in respect of the second scheme, the stage of actually deciding that that scheme was commercially eligible—unless indeed she must be taken not merely to have repudiated her architect's authority but to have decided that it was commercially ineligible. In the case of neither scheme did she form a settled intention to proceed. Neither project moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision. For these reasons and those given by my Lord, I think that the appeal should be allowed.

SINGLETON L.J. The judgment of the Lord Chief Justice was based primarily on the decision of this court in *Salisbury (Marquess)* v. *Gilmore* (1). There is a considerable difference between the two cases on the facts. In the *Salisbury* case (1) the facts were beyond dispute (2): the landlords had determined to pull down the premises at the termination of the tenancy and they had intimated to the tenant their intention. They had put forward a scheme and that scheme had been approved by the London County Council and by the Westminster City Corporation, and the necessary permission had been obtained before the termination of the tenancy. It is true to say that the headnote in that case and certain parts of the judgments lead to the view that an intention on the part of the landlords to pull down the premises at or shortly after the termination of the tenancy is sufficient to absolve the tenant from his contractual obligation.

Examination of the judgment of Lord Greene M.R., seems to me to show that the headnote is a little too wide. I draw attention to two passages in his judgment. The first (3): "If the tenant can show at the trial that at the moment "when the covenant fell to be performed the building was "one which was going to be pulled down at or shortly after "the termination of the tenancy he is entitled to the relief "which the sub-section gives," and later: "If it is shown "that before that date arrives the landlord has decided to "pull down the building and that this intention is still existing "at that date, the requirements of the sub-section are in my "opinion satisfied." In other words, if the landlord has arrived at a decision to pull down and if that decision stands at the date at which the tenancy ends, it matters not that the landlord subsequently changes his mind. It follows from this that there must be a decision on the part of the landlord. In one sense an intention to pull down may be the same thing, but it is not so unless it is a clearly formed intention, or a firm intention, in the sense that the landlord has made up his mind. Contemplation by the landlord is clearly not enough. If the landlord is considering what he should do and has a scheme put forward which is accepted by the authorities from whom permits have to be obtained, that is evidence that he has formed an intention to pull down, and probably evidence that he has come to a decision.

In the present case the scheme put forward was rejected by the London County Council, who refused to sanction it on October 8, 1945, that is, before the termination of the tenancy, which was on November 30, 1945. Another scheme was put forward by the architect on December 28, 1945 (after the termination of the tenancy), and was approved by the London County Council on March 22, 1946. The approval of the London County Council is subject to conditions which might or might not be agreeable to the landlord: the landlord was not bound to accept them; she might well say that the conditions were too onerous, or that the result of them was to make it not worth while pursuing a scheme which she had contemplated, even if it be assumed that the architect had full authority to put forward the second scheme. And the approval of Hammersmith Borough Council and the obtaining of a building licence were necessary before anything could be done. In the meantime there had been correspondence between the landlord's agent and the tenant's agent on the question of dilapidations, and a firm of builders acting for the landlord had been in communication with Hammersmith Borough Council seeking a licence to do the necessary repairs.

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(1) [1942] 2 K. B. 38.

(2) Ibid. 53.

(3) Ibid. 46–7.

In these circumstances I do not see that the tenant showed at the trial that, at the moment when the covenant fell to be performed, the building was one which was going to be pulled down at or shortly after the termination of the tenancy. In other words, he did not show a decision on the part of the landlord, or a firm intention. On the facts the landlord was contemplating pulling down and rebuilding; and probably she would have done so if she could have obtained approval of a scheme which was attractive commercially. On the other hand Hammersmith Borough Council might have inserted, as a term of their approval of a scheme, conditions as to selling price or as to rents which would have made it unattractive to the landlord.

The landlord was not called as a witness; but still the onus was on the tenant, and in my view he did not discharge it.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Atkins, Walter and Locke; Amphlett & Co.*

C. G. M.

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Principal and agent—Estate agent—Commission payable on introduction of person willing and able to purchase—Offer by person to purchase subject to satisfactory survey—No unqualified offer—Offeror arbitrator whether survey satisfactory—No right to commission.

An offer to purchase property upon a condition which leaves the person making the offer free at his will, even if the offer is accepted, not to proceed with the purchase, is not evidence that the person making the offer is "willing" to purchase the property. Thus, where a principal, putting up a property for sale, contracts with an estate agent to pay him commission on his introducing a person "willing" to purchase the property, the agent is not entitled to commission unless he can prove that the person introduced by him makes an offer or is willing to make an offer which, so far as he is concerned, is a firm offer not subject to condition.

Accordingly, if a person so introduced makes an offer "subject "to contract," or "subject to satisfactory survey," the normal inference being that the person introduced does so with a view to reserving to himself a locus poenitentiae, that conduct is inconsistent with the view that he is a "willing" purchaser, and the agent is not, by reason of the conditional offer, entitled to commission from his principal, the vendor. The person introduced has constituted himself the arbitrator on the issue whether he will purchase the property. But should the vendor, on receipt of an unqualified offer from the person introduced, accept it "subject to contract," the evidence would be that the person introduced was a "willing" purchaser and the agent, on his contract with the vendor, would be entitled to his commission.

Giddy and Giddy v. *Horsfall* (1947) 63 T. L. R. 160; [1947] 1 All E. R. 460, and *Bennett & Partners* v. *Millett* [1949] 1 K. B. 362, overruled. *E. P. Nelson & Co.* v. *Rolfe* [1950] 1 K. B. 139 explained.

Decision of Roxburgh J., sitting as an additional judge of the King's Bench Division, affirmed.

APPEAL from Roxburgh J., sitting as an additional judge of the King's Bench Division.

By letter dated September 1, 1949, the plaintiffs, estate agents, wrote to the defendant, who was anxious to sell premises known as 2 Merrivale, Southgate: "We confirm "that in the event of our introducing a person or persons "willing and able to purchase we shall look to you for the "payment of the usual commission as authorized by the "Chartered Auctioneers' and Estate Agents' Institute of "5 per cent. on the first 300*l.* and 2½ per cent. on the balance

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"of the purchase price." The property was put up at the price of 5,000*l*., freehold.

With a view to selling the property the plaintiffs introduced to the defendant a Mrs. Dinah Smith. On September 24 the defendant said that he would not accept less than 4,500*l*., and on September 26 Mrs. Smith, the intending purchaser, increased an earlier offer to that amount. The plaintiffs wrote on that date that they had accepted her offer to purchase the property at that sum "subject to contract." It was not clear from the letter whether the term "subject to contract" was introduced by the defendant or by the purchaser, but that doubt was resolved by the evidence of a director of the plaintiff company, who said that the defendant had given as a reason for not paying commission to the plaintiffs that he had accepted subject to contract the intending purchaser's offer.

Later, not being bound, the defendant telephoned to the plaintiffs that he had had a better offer of 4,650*l*. On October 3 the intending purchaser increased her offer to 4,650*l*. and on that date the plaintiffs wrote to the defendant that they had accepted her increased offer of 4,650*l*. "subject to contract, "satisfactory survey, vacant possession on completion on "or before October 27 next." The provision "subject to "satisfactory survey" was made at the instance of the purchaser. On the same day the defendant received a slightly larger offer from another person and sold the property to him.

The plaintiffs sued the defendant for 123*l*. 15*s*. commission on the ground that they had introduced a person willing and able at all material times to purchase the property. In evidence the intending purchaser's husband stated that his wife was able (not disputed) to complete the purchase and was very anxious to buy. He admitted that her offer was "subject to a surveyor's report" and, in cross-examination, that, had that report been sufficiently adverse, e.g., if a wall were reported to be falling down, she would not have been prepared to buy for 4,650*l*.

Roxburgh J. intimated that, had he not been bound by authority, he would have held that an offer which was not a firm offer, capable of acceptance so as to constitute a contract, would not establish that the person making the offer was willing to purchase. He stated that there was no reported case dealing with an offer "subject to satisfactory survey." Such a condition, he said, left the person making the offer the arbitrator of whether the survey was satisfactory. But he said that he recognized that the authorities made it impossible for him to conclude that an offer "subject to "contract" might not be evidence that the person making it was willing to purchase. He recognized that there was no logical distinction between "subject to contract" and "sub-"ject to survey," but he held that the fact that an offer was "subject to survey" precluded the possibility of the maker of the offer being a person willing to purchase before he had expressed his satisfaction with the survey. Accordingly, he held that the plaintiffs had never introduced to the defendant a person willing to purchase the property, and dismissed the action.

The plaintiffs appealed.

Stanley Rees for the plaintiffs. The distinction for the purpose of this argument between "subject to contract" and "subject to survey" or to "satisfactory survey" is one without a difference in law. In no one of these cases is the offer firm. But in *Giddy and Giddy* v. *Horsfall* (1) Lewis J. held that the introduction of a person who made an offer "subject to contract" at the price required by the vendor was the introduction of a party prepared to purchase on the terms of the vendor's instructions to his agents, and that therefore the plaintiff estate agents were entitled to their commission. In *E. P. Nelson & Co.* v. *Rolfe* (2) at the close of his judgment, Bucknill L.J. pointed out that in no less than three cases a contract in its essentials similar to the contract in that case had been before the courts, and in each case the defendant had been held liable to pay commission: one of the cases referred to must have been *Giddy and Giddy* v. *Horsfall* (1) or *Bennett & Partners* v. *Millett* (3), where Hilbery J., followed *Giddy's* case (1). The decision in *Giddy's* case, therefore, was assented to by the Court of Appeal, and the Court of Appeal will follow its own decision. The willingness of the person introduced may be conditional. Viscount Simon L.C. said in *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (4): "There is the class in which the agent is promised a com-"mission by his principal, if he succeeds on introducing "to his principal a person who makes an adequate offer,

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(1) [1947] 1 All E. R. 460.
(2) [1950] 1 K. B. 139, 141.
(3) [1949] 1 K. B. 362.
(4) [1941] A. C. 108, 120.

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" usually an offer of not less than the stipulated amount." It is not clear whether the Lord Chancellor was referring to a firm or a conditional offer. In this case it appears that the condition " subject to contract " was imposed by the defendant, the vendor. If that is so the condition " subject to satisfactory survey " was redundant, for the second condition is included in and is a part of the first. The person introduced by the plaintiffs to the defendant was a person willing and able to purchase the property, and therefore the plaintiffs were entitled to their commission. The decision of Roxburgh J. was wrong.

N. N. McKinnon for the defendant. The decision of Roxburgh J. was correct, and that of Lewis J. in *Giddy and Giddy* v. *Horsfall* (1) was wrong. That decision was not supported or upheld in *E. P. Nelson & Co.* v. *Rolfe* (2), since in that case it was admitted that the person introduced, one Payne, was " able, ready and willing " to purchase the bungalow. The court in *Nelson's* case (2) only relied on the decisions cited for the proposition that the fact that the persons introduced in those cases did not purchase the property, did not preclude the agents from recovering commission. The question of an offer made by the person introduced " subject to contract " did not arise on the facts of *Nelson's* case (2) and it was not discussed before the court. The decision in *Nelson's* case (2) does not affect the point here raised. The sole decision which stands contrary to my contention is that of Lewis J. in *Giddy and Giddy* v. *Horsfall* (1), and that decision does not bind the Court of Appeal. The offer of Mrs. Dinah Smith, the person introduced in this case, was only conditional: it was not a firm offer: see *Chillingworth* v. *Esche* (3). The offeror here had left herself in complete command of the situation: she could buy the property or not, as she chose. It would be an abuse of language to describe such a person as " willing " to purchase the property. When Viscount Simon L.C., spoke of the person introduced making an adequate offer in *Luxor (Eastbourne) Ld.* v. *Cooper* (4), he could not have referred to a conditional offer: the " adequate " offer must mean a firm offer. The onus is upon the plaintiff to prove the event on which he becomes entitled to claim commission, and here he has not done so. Whenever a condition

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(1) [1947] 1 All E. R. 460.

(2) [1950] 1 K. B. 139.

(3) [1924] 1 Ch. 97.

(4) [1941] A. C. 108, 120.

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is attached to the offer, there is, in any event, a modicum of unwillingness.

Stanley Rees replied.

Cur. adv. vult.

March 14. COHEN L.J., read the following judgment, in which he stated the facts and continued: Mr. Stanley Rees, for the plaintiffs, submitted that the distinction between "subject to contract" and "subject to survey" is a distinction without a difference, since under a provision "subject "to contract" an intending purchaser could refuse to sign a contract if he were dissatisfied with a survey. With this view I agree. I turn, therefore, to consider what is the state of the authorities on the subject.

I start with *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (1). As the House construed the contract in that case, commission was only payable if the introduction actually resulted in a sale. In such a contract their Lordships refused to imply a term that the principal would not dispose of the property himself or through other channels or otherwise act so as to prevent the agent from earning his commission. Some of their Lordships, however, pointed out the distinction between such a contract and a contract under which commission becomes payable on the agent's introducing a person who makes an adequate offer.

Thus, Viscount Simon L.C., said (2): "It may be useful "to point out that contracts under which an agent may be "occupied in endeavouring to dispose of the property of a "principal fall into several obvious classes. There is the "class in which the agent is promised a commission by his "principal if he succeeds in introducing to his principal "a person who makes an adequate offer, usually an offer of "not less than the stipulated amount. If that is all that is "needed in order to earn his reward, it is obvious that he is "entitled to be paid when this has been done, whether his "principal accepts the offer and carries through the bargain "or not."

Lord Russell of Killowen makes the distinction clearer. Thus, he said (3): "I do not assent to the view, which I think "was the view of the majority in the first *Trollope* case (4), "that a mere promise by a property owner to an agent to

(1) [1941] A. C. 108, 120.

(2) Ibid. 120.

(3) Ibid. 125.

(4) [1934] 2 K. B. 436.

" pay him a commission if he introduces a purchaser for the " property at a specified price, or at a minimum price, ties " the owner's hands, and compels him (as between himself " and the agent) to bind himself contractually to sell to the " agent's client who offers that price, with the result that if " he refuses the offer he is liable to pay the agent a sum equal " to or less than the amount of the commission either (*a*) on " a quantum meruit or (*b*) as damages for breach of a term to " be implied in the commission contract."

Later in his speech he said (1): " I have already expressed " my view as to the true meaning of a contract to pay a commission for the introduction of a purchaser at a specified " or minimum price. It is possible that an owner may be " willing to bind himself to pay a commission for the mere " introduction of one who offers to purchase at the specified " or minimum price; but such a construction of the contract " would in my opinion require clear and unequivocal language."

These observations in the House of Lords inspired estate agents to set about devising formulae intended to ensure that principals should not be able to escape liability by refusing to accept offers from persons willing to purchase. One such formula came under consideration by Lewis J., in *Giddy and Giddy* v. *Horsfall* (2). In that case the plaintiff's terms of commission were set out in a letter to the principal which contains the following paragraph: " We take this opportunity " of enclosing herewith a copy of our terms of commission " which are on the usual scale and which would become " payable by you in the event of our being instrumental in " introducing a party prepared to purchase on the terms of " your instructions or on terms acceptable to you." Giddy and Giddy introduced a Mrs. Stow, who made an offer " subject " to contract " at the price required by the defendant. The defendant refused to sell at that price but, when Mrs. Stow was so informed, she increased her offer to the price demanded by the defendant. After negotiation, however, the defendant refused to proceed.

Lewis J., held that Messrs. Giddy and Giddy were entitled to their commission. He cited the passages which I have read from the speech of Lord Russell of Killowen in the *Luxor* case (3), and said that the question which he had to decide was whether the contract clearly showed that the commission

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(1) [1941] A. C. 129.

(2) [1947] 1 All E. R. 460.

(3) [1941] A. C. 108, 125, 129.

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was to be payable if Messrs. Giddy and Giddy introduced a person who was willing to purchase. and he answered the question in the affirmative. He therefore gave judgment for the plaintiff estate agents.

The arguments in the case are not reported, and there is nothing in the report of the judgment to show that the judge's attention was called to such cases as *Chillingworth* v. *Esche* (1) which establish that, as a general rule, where an offer is made and accepted " subject to contract," neither party is bound unless and until a definite contract is executed. The point was, however, I think, present to his mind, for towards the end of his judgment he said (2) : " It might be the fact that, as " Mrs. Stow did not in fact purchase and " (these are the material words) " did not even enter into a binding contract, " the plaintiffs should be held to be wrong, but looking at that " paragraph " (the paragraph I have read from the commission note) " I think it is abundantly clear that the plaintiffs were " saying, ' The scale commission—the arithmetic of it—is to be " ' found on the printed circular which we enclose, and com- " ' mission at that rate will be payable by you if we introduce " ' a bona fide person who is prepared to pay and is capable " ' of paying the price you are asking for Redlands.' Mrs. " Stow was perfectly able and willing and capable. She was " anxious to buy and I am constrained to say that the plaintiffs " are entitled to the commission which they claim." In my opinion, therefore, *Giddy and Giddy* v. *Horsfall* (2) is authority for the proposition that a person may be willing to purchase notwithstanding that his or her offer may have been made subject to contract.

In *Bennett & Partners* v. *Millett* (3) the contract between principal and agent was in slightly different terms from that under consideration in *Giddy and Giddy* v. *Horsfall* (2), but the court construed it as having the same effect. The agents introduced a person who signed a memorandum containing an offer of the price required by the principal, the memorandum being expressed to be " subject to contract." It is clear from the report that no argument was addressed to the judge based on the memorandum being expressed to be " subject to con- " tract ", and that he did not have the point in mind. That case therefore carries the matter no further than *Giddy and Giddy* v. *Horsfall* (2).

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(1) [1924] 1 Ch. 97.

(2) [1947] 1 All. E. R. 460.

(3) [1949] 1 K. B. 362.

The only other case to which I need refer is the decision of this court in *E. P. Nelson & Co.* v. *Rolfe* (1). In that case the contract between principal and agent was in similar terms to that in *Giddy and Giddy* v. *Horsfall* (2) and indistinguishable in any material particular from the contract in the case before us. But in *E. P. Nelson & Co.* v. *Rolfe* (1) the person introduced by the plaintiffs never actually got to the stage of making an offer. The material facts were that a Mrs. Payne arrived, having been sent by the plaintiffs. She liked the bungalow but said that she wished her husband to see it. He could not come until the next day, and she asked the defendant's wife to keep it for them. The defendant's wife said she could not do so, as it might be sold before they had reached a decision. Mrs. Payne then went away, but she returned in the afternoon with her husband. The defendant's wife then said that the house was sold, that she had given an option on it, and that a deposit had been paid. It was admitted that at all material times Payne was able, ready and willing to purchase the premises, and the only question decided was that an obligation, binding morally or in a business sense, but not in law, to sell to someone else, did not excuse the principal from his liability to pay commission under such a contract as we are considering.

It is, however, relevant to observe that both *Giddy and Giddy* v. *Horsfall* (2) and *Bennett & Partners* v. *Millett* (3) were cited, for Bucknill L. J. said (4): " As it had not been sold, I " think that the contract was still in existence. Its terms are " plain. It is not disputed that Mr. Payne was a man able, ready " and willing to purchase the property in the afternoon of Octo- " ber 5. The property was not, in fact, sold at that time. That " being so, I think the defendant is liable. I need not refer " to the cases which have been drawn to our attention in the " course of the argument except to point out that in no less " than three cases " [*Giddy and Giddy* v. *Horsfall* (2), *Bennett* " *& Partners* v. *Millett* (3), and *Dennis Reed Ld.* v. *Nicholls* (5)] " a contract in its essentials similar to this has been before " the courts, and, in each case, the defendant has been held " liable to pay commission, although, in fact, the person " introduced has not purchased the property."

That being the state of the law, Mr. McKinnon for the defendant invites us to say that *Giddy and Giddy* v. *Horsfall* (2) was wrongly decided and that the proper view is that which obviously commended itself to Roxburgh J. in the present case, that is, that under a contract to pay a commission to an agent who introduces a person able and willing to purchase a property the agent can never recover unless he can prove that the person so introduced made an offer or was willing to make an offer which by acceptance could be turned into a firm contract.

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(1) [1950] 1 K. B. 139.
(2) [1947] 1 All E. R. 460.
(3) [1949] 1 K. B. 362.
(4) [1950] 1 K. B. 145.
(5) [1948] 2 All E. R. 914.

Mr. Stanley Rees submitted that we were precluded from so holding by the decision of this court in *E. P. Nelson & Co.* v. *Rolfe* (1). I do not think that this is so. The question of the effect of the words " subject to contract " does not appear to have been discussed, and the question did not arise on the facts of the case. As I read the judgments, we were in that case only relying on the decisions cited as authority for the proposition that the mere fact that the person introduced did not actually purchase the property did not preclude the agent from recovering commission.

E. P. Nelson & Co. v. *Rolfe* (1) carried the matter a stage further in that it established that the fact that the person introduced had not actually made an offer was not fatal to the agents' claim. It is not, however, in my opinion, any authority for the proposition that an offer upon a condition which leaves the offeror free at his will, even if the offer is accepted, not to proceed with the purchase is evidence that the offeror is a person able and willing to purchase. The only case which supports this proposition is that of *Giddy and Giddy* v. *Horsfall* (2), and that case is not binding on us. I am unable to agree with it.

In reaching my conclusion, I am not saying that the introduction into the preliminary arrangements of the expression " subject to contract " would necessarily in all cases prevent the agent from establishing that the person he introduced was willing to purchase. It clearly would not be fatal to the agent's claim if it were introduced by the vendor in accepting an unqualified offer; but, if it were introduced by the prospective purchaser, the normal inference would be that he did so with a view to reserving to himself a locus penitentiae—conduct which seems to me inconsistent with the view that he is a willing purchaser.

In reaching my conclusion, I derive some assistance from the recent decision of this court in *Cunliffe* v. *Goodman*

(1) [1950] 1 K. B. 139.

(2) [1947] 1 All E. R. 460.

(1). In that case we had to consider the effect of the decision of this court in *Salisbury* (*Marquess*) v. *Gilmore* (2), where it was held that in deciding whether a tenant had proved that premises were shortly after the termination of the tenancy to be pulled down, the test was the intention of the landlord at the termination of the tenancy.

In *Cunliffe* v. *Goodman* (1) the question was the meaning in that contract of the word " intention." We came to the conclusion that, while the intention might be revocable, it must not be provisional or conditional. I said in that case (3) : " Reading the correspondence as a whole, I have come " to the conclusion that the plaintiff never reached more than " a provisional decision. She would obviously not rebuild " unless the proposed scheme would provide an adequate " return on the capital she would have to sink in it. It was " plain that she could not reach a judgment on this point " until she knew (*a*) what conditions the authorities would " impose as to rent, etc., (*b*) what the proposed buildings " would cost, and (*c*) what interest she would have to pay in " order to finance the scheme. The financial aspect was " plainly present to her mind throughout and reading the " correspondence as a whole, I find it impossible to conclude " that the defendant has discharged the onus which rests on " him of proving that before November 30, 1945, the plaintiff " had decided to pull down the building and that that intention " was still existing at that date."

Applying that case by analogy to the case before us, I think that the agent may prove that a person whom he has introduced is willing to purchase the property by showing that that person has made an unqualified offer or expressed an unqualified intention to make an offer notwithstanding that such an offer until accepted could be withdrawn. On the other hand, if the evidence shows that the offer is qualified by a condition inserted to prevent the other party's turning the offer into a contract by acceptance, I think it impossible to say that the agent has discharged the onus which rests on him of proving that the person whom he has introduced was willing to purchase the property. In my opinion the agent only succeeded in *E. P. Nelson & Co.* v. *Rolfe* (4) because, as Bucknill L.J. said, it was not disputed that Payne was a man, able, ready and willing to purchase the property. Had the evidence indicated that, when

(1) Ante p. 237.

(2) [1942] 2 K. B. 38.

(3) Ante p. 252.

(4) [1950] 1 K. B. 139.

Payne returned with his wife to inspect the bungalow, he had not expressed his willingness to buy, the decision might, I think, well have been the other way.

In the present case there was some evidence that Mrs. Smith was keen on purchasing. She had continually increased her offer to meet the rising appetite of the defendant, and she was described by her husband as anxious to purchase; but she never made an unqualified offer, and her anxiety was at all material times qualified by the condition, " subject to satis-" factory survey." Such an offer meant that she had constituted herself the arbitrator whether the survey was satisfactory, and the principal could not, by accepting her offer, constitute a binding contract. In these circumstances, I think the judge was right in his conclusion, and that the plaintiffs had not established that Mrs. Smith was a " person " willing to purchase the property." For these reasons I think that the appeal fails and should be dismissed.

ASQUITH L.J. I agree.

SINGLETON L.J. This is a case of importance from the point of view of estate agents and also from the point of view of the public. It appears that, since the decision of the House of Lords in *Luxor* (*Eastbourne*) *Ld.* v. *Cooper*, (1) estate agents have adopted a new form of contract under which one who wishes to dispose of his property and who puts it into the hands of agents is asked to sign a form or to agree to a term that the ordinary rate of commission shall become payable to the agents in the event of their being instrumental in introducing a person prepared to purchase, or willing and able to purchase, on the terms of the client's instructions.

That kind of contract was considered by Lewis J., in *Giddy and Giddy* v. *Horsfall* (2), in which case the agents had produced a Mrs. Stow who was prepared to purchase at an agreed figure, but whose offer was " subject to contract." The owner backed out. It was held by Lewis J., that, though the owner was not bound to sell to Mrs. Stow, still the agents were entitled to their commission as against the owner. The plaintiffs here, the agents, rely on that decision and they claim that it was approved by this court in *E. P. Nelson & Co.* v. *Rolfe* (3). In that case the court decided that an

(1) [1941] A. C. 108.
(2) [1947] 1 All. E. R. 460.
(3) [1950] 1 K. B. 139.

owner might be liable to pay commission although the person introduced had not purchased the property. Bucknill L.J., in the course of his judgment, referred to *Giddys'* case (1) as one of several supporting that view. Further than this the court did not go. No question arose on the words "subject "to contract": there was no such term in that case. I do not know that there is any decision of the Court of Appeal which supports the view that commission is payable to the agents if all that they do is to produce a person who is willing to purchase "subject to contract." It may be so, if the owner has introduced such a term himself. The question must always be determined by the terms of the contract between the owner and the agents.

In the case under appeal, commission was payable to the agents "in the event of our introducing a person or "persons willing and able to purchase." The agents introduced a Mrs. Dinah Smith. Their letter of September 26, 1949, introduces the words "subject to contract." It appears uncertain how the words "subject to contract" came to be introduced. It may be that they have become more or less common form with some people. But a further term or condition was introduced in the letter from the agents dated October 3 (which contains the introduction on which they rely as giving them a right to commission). The agents wrote to the owner, "Acting in accordance with your instructions we "have accepted the increased offer of our applicant, Mrs. "Dinah Smith, to purchase your property as above in "the sum of 4,650*l.* freehold subject to contract, satisfactory "survey . . . ." "Subject to satisfactory survey" means either subject to the proposed purchaser's receiving a surveyor's report which is satisfactory to him, or subject to the report being a satisfactory one. So far as I can find, there had been no mention of this beforehand. The agents' managing director gave evidence as to a conversation with the defendant (the owner) on the afternoon of October 3, in which the owner told him he could carry on with the sale to Mrs. Smith at 4,650*l.*, and the defendant was not called to deny this. The witness did not say that there was any mention of "subject to "survey." There is importance in such a term: there might be dry rot in the house, the drains might be out of order, or the value when the condition of the property was seen might be far below that which was asked. These are matters of a kind which the owner might prefer not to have raised, and there is no reason why he should agree to the introduction of any such term.

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(1) [1947] 1 All E. R. 460.

It was submitted that the words "subject to satisfactory "survey" add nothing to the words "subject to contract," and that consequently this court ought to follow the decision of Lewis J., in *Giddy's* case (1) (and inferentially of this court in *Nelson's* case (2)) and hold that commission is payable to the agents in the present case.

In *Chillingworth* v. *Esche* (3), the purchasers agreed to purchase certain freehold land from the vendor subject to a proper contract to be prepared by the vendor's solicitors. It was held that the document was only conditional and did not contain a firm contract. Warrington L.J., said (4): "It has been held over and over again that where you have "a document relating to the sale and purchase of land framed "in these terms, the object of inserting those words is to avoid "binding the parties unless and until the contract referred to "has been prepared and signed by both parties"; and again (5): "I am clearly of opinion that this document of July 10, "1922, was nothing more than a conditional offer and "acceptance, and would only ripen into a contract when "a formal document was signed." And Sargant L.J., said (6): "They are words appropriate for introducing a condition, "and it would require a very strong and exceptional case for "this clear prima facie meaning to be displaced."

Bearing this in mind, I cannot accept the decision of Lewis J., in *Giddy and Giddy* v. *Horsfall* (1) as correct. An owner is willing to sell his property for a certain sum: if on a contract such as there was in that case the agent produces a person willing to purchase at that price, the agent may well be entitled to commission; but, if the person introduced makes his offer or acceptance "subject to contract," I do not think that the agent is entitled to commission. In other words, the acceptance is a conditional acceptance and no more than that.

In the present case there was introduced the further term "subject to satisfactory survey." To the mind of the trained lawyer that may add nothing beyond "subject to contract," but it did mean something to the purchaser and to the agents,

(1) [1947] 1 All E. R. 460.
(2) [1950] 1 K. B. 139.
(3) [1924] 1 Ch. 97.
(4) Ibid. 109.
(5) Ibid. 111.
(6) Ibid. 114.

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otherwise it would not have been introduced. It was said in the course of the argument that the words "subject to contract" have become more or less common form as inserted by agents. But if an owner receives an acceptance "subject to satis-"factory survey," attention is drawn to the fact that the person is keeping open questions in regard to the condition of the property. Why should it be regarded as an acceptance of the owner's offer of the property? It is not an unconditional acceptance, nor is it an offer which the owner is bound to accept even if he were prepared to accept an offer "subject to contract." The latter is usually taken to mean "provided that our "respective lawyers can agree upon the form of contract," though it may have a wider legal significance. The owner may well be disposed to say: "I am not going to accept an offer "which re-opens the question of the condition of the property" the more so if he has an equally good (or a better) offer independent of any such term.

In my view it has not been shown that the person introduced, Mrs. Dinah Smith, was willing to purchase. The evidence of her husband shows that she required a surveyor's report, and her offer (or acceptance) was conditional upon that. To substantiate their claim to commission the agents must show that they introduced someone willing to purchase on the owner's terms or on terms acceptable to him, and they have not done that. No doubt Mrs. Smith was anxious to purchase the property, but her willingness to do so was dependent on the surveyor's report, and it was so stated in the letter of October 3. Any other view would put agents in a position which to my mind is completely untenable. A property might be in the hands of half a dozen agents each of whom produced a person prepared to pay the price asked "subject to contract and "subject to satisfactory survey." Is each entitled to commission, regardless of the introduction of that term which proved a complete obstacle in each case? Or the same firm of agents might produce first one and then another person each of whom was prepared to purchase at the price asked subject to such conditions. And each might turn down the property on his surveyor's report. Is the firm entitled to commission in respect of each introduction? Surely not, unless the owner can be said to have embraced those conditions in his offer.

I agree with Roxburgh J., that the agents have not proved

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that they are entitled to commission, and I am in favour of dismissing the appeal.

Appeal dismissed.

Solicitors: *William White & Co.; Craigen, Hicks & Co.*

C. G. M.

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Bucknill and Denning L.JJ., and Hodson J.

Principal and agent—Sale of house—Estate agent's commission—Instructions to "find someone to buy my house"—Person "ready, "able and willing to purchase" introduced by agent—Provisional agreement to purchase "subject to formal contract"—House sold by principal to another purchaser—Whether agent entitled to commission.

The defendant orally instructed the plaintiff, a house agent, to "find someone to buy my house." Nothing was said at the time about commission. The plaintiff introduced a person who was willing to purchase the house at a price near to that specified by the defendant, but who was unable to pay in full until she had arranged a mortgage. The defendant and the intending purchaser signed a provisional agreement "subject to contract." The defendant desired to purchase another house, on which he had an option until a certain date, but could only do so with the purchase money of his own house. Therefore, on receiving through another house agent a cash offer for the house, he withdrew his instructions from the plaintiff, who thereupon brought an action claiming commission for having introduced a person who was "ready, willing and able" to buy the defendant's property.

Held, that the words "find someone to buy" were equivalent to "find a purchaser," and that the plaintiff was not entitled to commission for he had not introduced a person who had actually completed the contract or had entered into a binding and enforceable contract to do so.

Luxor (Eastbourne) Ld. v. *Cooper* [1941] A. C. 108, applied.

Per Denning L.J. A person may not properly be said to be willing to purchase, so as to entitle an agent to commission, unless he has given irrevocable proof of his willingness by entering into a binding contract to purchase.

APPEAL from Newton Abbot county court.

In August, 1949, the defendant, Hicks, a boiler cleaner and the owner of a house in Buller Road, Newton Abbot, wished to sell it in order to be able to buy another in Halcyon Road. He therefore instructed the plaintiff, McCallum, an estate agent, and practically every other estate agent in Newton Abbot, Paignton, Torquay and Plymouth, to sell the house. In the case of the plaintiff, the instructions, given through a clerk, were to "find someone to buy my house." Details of the situation of the house, the number of rooms, and so forth, were supplied by the defendant, and the price required (1,250*l.* "or near offer") was stated. There was no mention of commission and nothing was put into writing. The plaintiff introduced a Mrs. Kelly as ready, able and willing to purchase the house for 1,200*l.* She paid a deposit of 5*l.*, and promised to find the balance of the purchase price in ten days, after she had arranged a mortgage. On September 5, 1949, a provisional agreement for the sale of the house to Mrs. Kelly for 1,200*l.* was entered into between her and the defendant vendor, "subject to formal contract." On September 9 the defendant, having heard from another firm of estate agents that they had a client ready to buy the house and to pay in cash, withdrew his instructions from the plaintiff. In those circumstances the plaintiff brought the present action, claiming 37*l.* 10*s.* for having, according to the statement of claim, pursuant to the defendant's instructions, found a purchaser who was ready, willing and able to buy the property.

The action came on for hearing before Judge Pratt, who on December 15 gave judgment for the plaintiff. He interpreted the words "someone to buy" as "someone who was ready and "willing, and able to buy," and found as a fact that the plaintiff had done the work which he was instructed to do. The defendant appealed.

Dennis Smith for the defendant. The House of Lords in *Luxor (Eastbourne) Ld.* v. *Cooper* (1) held that the words "find a purchaser" mean "find someone who enters into "a binding contract to purchase." It is submitted that the direction given in the present case, to "find someone to buy "my house," has the same meaning. There was no binding contract between the defendant and the intending purchaser under the memorandum of agreement, because it was expressly stated to be "subject to formal contract." Either party therefore could withdraw at any time. There was no evidence that the intending purchaser was able to buy. She could only find the purchase price by effecting a mortgage. That must take time, and the defendant required prompt payment

(1) [1941] A. C. 108, 154.

in order to purchase another property before a fixed date. [*Graham and Scott* (*Southgate*) *Ld.* v. *Oxlade* (1) also referred to.]

Herrick Collins for plaintiff. The question whether the instructions given to the plaintiff had been carried out by him was one of fact for the judge, and there was ample evidence to support his conclusion. If it be necessary to interpret the expression "find someone to buy," it is submitted that it means someone able and genuinely intending to buy, or able and prepared, or meaning business in connexion with the purchase of the house, in each case at a price acceptable to the vendor. The judge was justified in finding, on the evidence, that the intending purchaser answered to either of those interpretations. Whether somebody is able and willing to buy is a question of fact, and the judge has come to a conclusion on it which is fully supported by the evidence. The present case is distinguishable from *Graham and Scott* (*Southgate*) *Ld.* v. *Oxlade* (1), because the condition in the provisional agreement, "subject to formal contract," was not inserted at the wish of the intending purchaser.

[*Dennis Reed Ld.* v. *Nicholls* (2) and *E. P. Nelson & Co.* v. *Rolfe* (3) also referred to.]

BUCKNILL L.J. stated the facts and continued: The point in this case is whether the contract between the plaintiff and the defendant was to pay a commission if the plaintiff found a purchaser, or whether the defendant agreed to pay a commission if the plaintiff found someone ready, willing and able to buy the house. The judge at the conclusion of his judgment, which is quite short, said: "I must interpret "'someone to buy' as someone who was ready and willing "and able to buy"; and he found as a fact that the plaintiff did the work which he had been instructed to do. It is obvious that a good deal has to be read into what took place in order to spell out a contract between the plaintiff and the defendant, for there was no mention of commission in the conversation between the defendant and the plaintiff's clerk. Therefore, the defendant's agreement to pay commission must be implied. The condition on which he agreed to pay it was that the plaintiff should find someone to buy his house. That to me means an undertaking to pay commission if the agent found a purchaser of the house.

(1) Ante, p. 257.

(2) [1948] 2 All E. R. 914.

(3) [1950] 1 K. B. 139.

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"Someone to buy" is another and a more colloquial way of saying "a purchaser." To read the expression in the way in which the judge has read it seems to me not only to place a strained construction on the words but also to introduce a term which is unreasonable in two respects: first, it would mean that, in a case of this kind, if the intending purchaser, before any formal contract had been made, had decided to retire from the negotiation because she had found another house more suitable, the defendant would be liable still to pay the commission because the plaintiff did find someone who was, at any rate at one time, ready, able and willing to purchase.

Then, again, where the vendor is a poor man, without private means other than his house, he would naturally pay the commission out of the purchase price, which he will not receive until a formal and binding contract has been made. I think that it would be unreasonable to suppose that he contemplated having to pay commission to anyone who had not in fact found a purchaser for the house. It seems to me also that, in a case of this kind, where the vendor was very anxious to sell the house quickly in order to buy another house—and one has to move quickly in these times if one wants to secure a house—and placed it in the hands of a great number of agents, it would be very unreasonable if he thereby made himself liable to pay commission to any agent who happened to find a purchaser who was ready, able and willing to buy. It must be easy to find someone who is willing to buy a house today. Whether they are able to buy is perhaps another matter.

I think that the judge put an erroneous construction on the contract made between the plaintiff's agent and the defendant, and that this appeal should be allowed.

DENNING L.J. The words "find a purchaser" and "introduce a purchaser" have a meaning which is well understood. When an ordinary house-owner goes to a house agent and asks him to "find a purchaser," that means that the agent is to find a person who will actually complete the purchase of the house, it being understood that the agent's commission is to be paid out of the purchase price. That is the common understanding of men in these matters. If the sale is not completed, the agent gets no commission unless he has procured an actual, binding and enforceable contract for purchase. Once the purchaser and vendor have signed and exchanged

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a contract, the agent has earned his commission because, if the purchaser does not complete, the vendor can recover the amount of the commission from the purchaser by way of damages. Lord Romer put it succinctly in *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (1), where he said: "Where an owner of property "employs an agent to find a purchaser, that must mean at "least a person who enters into a binding contract to purchase." It is only then that the agent becomes entitled to commission (2).

Some agents recently have been endeavouring to get house-owners to sign forms much more favourable to the agent. They have been trying to alter the ordinary understanding by getting house-owners to sign a document which makes them liable for commission if the agent introduces "a person "able, ready and willing to purchase." Once such a form is signed, they say, they are entitled to commission if they introduce a man who makes an offer but does not sign a binding contract. If this is correct, it means, that where a number of house agents induce a house-owner to let them put his house on their books—as they often do—the house-owner may find himself liable to pay commission not only on the sale which is completed through one agent, but also on offers which have been made through other agents and have never reached a binding contract: see, for instance, *Giddy and Giddy* v. *Horsfall* (3), *Bennett & Partners* v. *Millett* (4), and *Nelson* v. *Rolfe* (5). This is so contrary to the common understanding of men—and also, I may add, to common fairness—that the courts will endeavour to interpret the contract so as to avoid such a result. As I pointed out in *Lee & Sons* (*Grantham*) *Ld.* v. *Railway Executive* (6), the common law is vigilant to prevent any abuse of freedom of contract; and, rather than permit any abuse, it will assume that the party intended to be reasonable and will give the contract a reasonable interpretation. This is especially so in the case of forms which the public are invited to sign without reading, or at any rate without legal advice. So, recently, in the notable decision of *Graham & Scott* (*Southgate*) *Ld.* v. *Oxlade* (7), this court held that a person could not be said to be "willing" to purchase if all that he had done was to sign "subject to contract" or "subject

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(1) [1941] A. C. 108, 154.

(2) See, however, the qualification expressed by Denning L.J., in *Dennis Reed Ld. v Goody* (post pp. 277, 285).

(3) (1947) 63 T. L. R. 160.

(4) [1949] 1 K. B. 362.

(5) [1950] 1 K. B. 139.

(6) (1949) 65 T. L. R. 604.

(7) Ante, p. 257.

"to survey." This shakes the authority of the intervening cases, and opens the way to an interpretation of the new form of words so as to give them the same effect as "find a purchaser." A person may not properly be said to be "willing" to purchase, so as to entitle an agent to commission, unless he is irrevocably willing, that is, unless he has given irrevocable proof of his willingness by entering into a binding contract to purchase.

In this particular case, however, there was nothing in writing: there was simply an oral request. The house-owner said to the house agent, "see if you can find someone to buy my "house." What is the proper interpretation of that contract? I have no doubt that it means, "find me a purchaser." The agent is entitled to a commission if the sale is completed, or if a binding contract is made. But neither of those two things happened: the sale was not completed, and there was no binding contract; it was all "subject to formal contract." The house-owner sold his house through another agent and paid that agent commission. This particular plaintiff is not entitled to any commission. I agree with my Lord that the appeal should be allowed.

Hodson J. The county court judge found as a fact that at the end of August, 1949, the defendant instructed the plaintiff to find someone to buy his house at 1,250*l*., or near offer. It is not necessary, in my opinion, for this court to go further than to construe those words. In *Luxor (Eastbourne) Ld.* v. *Cooper* (1), to which Denning L.J. has referred, Lord Simon referred to the usual arrangement made with house-agents, and quoted with approval the observations in *Prickett* v. *Badger* (2), of Williams J., who spoke of the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but that if not then he is to get nothing. It is necessary, as Lord Russell pointed out in the same case (1), for an agent, if he wishes to go beyond the usual established practice, to introduce terms which make it clear that he is to get a commission at a point short of a completed sale. On the interpretation of these words I think it impossible so to find. "Someone to buy my house" means, in its plain meaning, in the light of the established practice, a buyer of the house, which in terms is equivalent to a purchaser of the house. There was in this case no contract for

(1) [1941] A. C. 108, 121.

(2) (1856) 1 C. B. (N. S.) 296.

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sale, as has been admitted. In those circumstances, I think it unnecessary to consider further whether, if the county court judge had been justified in interpreting the words as being willing, able and ready to buy at the figure named, there was evidence which would justify a judgment in favour of the plaintiff.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co., for Lee-Barber, Goodrich & Co., Torquay; Baileys, Shaw & Gillett, for Tozers, Newton Abbot.*

A. W. G.

Followed. BOOTS v. E. CHRISTOPHER & CO. [1952] 1 K.B. 89

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Mar. 24, 27, 28; *Apr.* 4
Bucknill and Denning L.JJ., and Hodson J.

Principal and agent—Estate agent—Commission—Sale of house—Agreement by principal to pay commission on introduction of person ready, able and willing to purchase at specified price—Conditional written offer by person introduced—Withdrawal of offer—Whether commission payable.

The defendants, the owners of a dwelling-house, signed a contract with the plaintiff house agents which was in the following terms: "I hereby instruct you to find a person ready, able and "willing to purchase the above property for . . . . 2,825*l.* or "such other price to which I shall assent. Upon your introducing "such a person I will pay you commission" [in accordance with a scale set out]. The plaintiffs introduced H., who signed an agreement prepared by the plaintiffs to buy the house for a sum acceptable to the defendants, but subject to the vendors' agreeing to indemnify him against future road charges. The defendants took time to consult their solicitor before themselves signing the agreement. During the delay which resulted H. withdrew his offer to purchase. The plaintiffs claimed to be entitled to their commission as having introduced "a person "ready, able and willing to purchase."

Held, per totam curiam, that, as the person introduced had withdrawn from the negotiations before any binding contract had been made, and the defendants had never been in default, the plaintiffs had not introduced a person "ready, able and willing "to purchase" within the meaning of the contract of agency, and were therefore not entitled to commission.

Per Denning L.J. and Hodson J. The words "upon your "introducing" were equivalent to "in consideration of your

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"introducing," and did not indicate that commission was payable at the time of introduction.

Per Denning L.J. The common understanding of men being that commission is payable out of the purchase price, if the agent desires to bind the principal to pay commission not only on sales but also on offers, he must use clear and unequivocal language to that effect, otherwise either the purchaser or the vendor may withdraw at any time before a binding contract is made, and no commission will be payable; and, even when a binding contract is made, if the purchaser fails to perform the contract, no commission will be payable unless the vendor recovers in an action for specific performance or in an action for damages; but he is not bound to bring any action against the purchaser. Commission, however, will be payable if the vendor fails to complete and the purchaser remains ready, able and willing to complete.

Per Hodson J. The agreement prepared by the plaintiffs and signed by H. was no more than a conditional offer to purchase. The qualification as to indemnity in respect of road charges was sufficient to take H. out of the category of "willingness."

Appeal from Maidstone county court.

On May 11, 1949, a clerk employed by the plaintiff estate agents visited the house of the defendants, one Goody and his wife, at Harrow, and it was orally agreed between him and Mrs. Goody that the plaintiffs were to be appointed as sole agents for the sale of the house for a period of one month. Mrs. Goody also signed a form presented by the clerk which contained the following material passages: "Date when "vacant possession will be given? Six or eight weeks from "date deposit is paid. Are any road or paving charges out-"standing? No. I hereby instruct you to find a person ready, "able and willing to purchase the above property for the "sum of 2,825*l.*, or such other price to which I shall assent. "Upon your introducing such a person I will pay you com-"mission in accordance with the Incorporated Society's scale "[scale set out]. I further authorize that, should you consider "it desirable so to do, you shall be at liberty to obtain and "execute a contract on my behalf."

On May 17, one Budge, a representative of the plaintiffs, called at the defendants' house and introduced one Himsley and his wife as potential purchasers. On that occasion the defendant Goody confirmed that there were no road charges outstanding; and on that day or the next he assented to a price of 2,750*l.* On May 20 Himsley signed an agreement to purchase the house for 2,750*l.*, and paid a deposit of 275*l.* to the plaintiffs as agents of the defendants. By the terms of that agreement the purchase was to be completed and full vacant possession to be given on or before July 8. The agreement was on a printed form, but Himsley insisted on the typewritten addition of the following clause: "It is clearly "understood that the purchaser is purchasing on the under-"standing that the road charges are paid in respect of the "property, or, if not, the vendor will indemnify him against "any road charges which may be outstanding." The road in fact had not been taken over by the local authority.

There was also added to the agreement a typewritten clause requiring the assignment by the vendor to the purchaser of his rights under the Town and Country Planning Act, 1947. The defendant Goody refused to sign that agreement until he had consulted his solicitors. A draft agreement was then prepared by the defendant's solicitors and forwarded to Himsley, who refused to sign it because it contained no indemnity against road charges. On June 21 Himsley cancelled his offer to purchase and asked for and obtained the return of his deposit. It subsequently transpired that the vendors had been willing to give the indemnity, but that a clause to that effect had, owing to a misunderstanding, been omitted from the draft agreement. In those circumstances the plaintiffs brought the present action claiming from the defendants 76*l.* 5*s.* 0*d.* by way of commission. The county court judge dismissed the action, and the plaintiffs appealed.

Barry K.C. and *H. E. Francis* for the plaintiffs. It is submitted that what the plaintiffs have to prove, and have succeeded in proving, is that at the time of the introduction they introduced a person who was ready, able and willing to purchase at a price acceptable to the vendor, and who therefore fulfilled all the requirements of the contract of agency. The person introduced made an unqualified offer to purchase and also signed an agreement which was not made "subject to "contract" or "subject to survey" as was the case in *Graham and Scott (Southgate) Ld.* v. *Oxlade* (1). In *James* v. *Smith* (2) Bankes L.J. said "commission is payable when a contract "to purchase is signed by a person willing and able to com-"plete"; and it is submitted that that means that on the signing of the contract the commission is payable. In the same case, Atkin L.J. said (3): "I think that ability does not

(1) Ante, p. 257.
(2) [1931] 2 K. B. 317,
(3) Ibid 322.

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" depend upon whether the purchaser has the money in hand " at the time," which means at the time when the contract was signed.

[DENNING L.J. Suppose that he had the money at the time when he signed the contract. but owing to some financial disaster were not able to complete ?]

If, at the time of signing, he was " able and willing ", the agent is entitled to commission. In the present case " the " time " is at the introduction of a person ready, able and willing, who shows it by making a firm offer. " Upon " your introducing " must be construed in a temporal sense, and it does not matter whether the vendor accepts or not if the agent introduces a person who is ready, able and willing to purchase. It does not matter whether the negotiations fell through because of the fault of one party rather than of the other. [*Green and Another* v. *Lucas* (1), and *Fisher* v. *Drewett* (2) referred to.]

Ungoed-Thomas K.C. and *Neligan* for the defendants. Whatever may be the true construction of the agency contract, it is certainly ambiguous. Such a construction as the plaintiffs claim for it would require clear and unequivocal language : see per Lord Russell in *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (3). The more favourable a document may be to the person who is putting it forward the more stringent is the requirement that it shall be clear to the person to whom it is intended to offer it. The plaintiffs contend that it is sufficient for them to show that at one moment of time there is a person ready, able and willing to purchase. It is submitted that he must be ready, able and willing to purchase at the proper time, that is, all the time or at the relevant time. " Purchase " primarily means " to complete the purchase." That was the view taken by Hilbery J. in *Bennett & Partners* v. *Millett* (4) ; and in *Giddy and Giddy* v. *Horsfall* (5). Lewis J. adopted the same view. If " purchase " means " contract to purchase " there must be a reasonable interval to enable the vendor to consider the offer. He must be given an opportunity to consult his solicitor. " Able " clearly means, on authority, ability to purchase at the time of the completion of the contract : *James* v. *Smith* (6). " Willing " means willing to complete the contract and not willing to offer to purchase. The purchaser

(1) (1876) 33 L. T. 584.

(2) (1878) 48 L. J. (Exch.) 32.

(3) [1941] A. C. 108, 129.

(4) [1949] 1 K. B. 362.

(5) (1947) 63 T. L. R. 160.

(6) [1931] 2 K. B. 317 n.

being ready able and willing at the proper time for completion, if the vendor repudiates the contract, the agent gets his commission. In the present case the authority given to the agent, so far as there was an authority, was to make an open contract. The disagreement as to road charges and the retention of the deposit by the agents took the matter out of that authority. The original authority did not give the agents the right to keep the deposit and the vendor was entitled to take time to consider that matter.

[DENNING L.J. Suppose that they had a firm contract ?]

They would still have to show that the purchaser was ready, able and willing at the time of completion. As to agents' authority to make contracts, see *Keene* v. *Megr* (1).

In *Dennis Reed Ld.* v. *Nicholls* (2) the qualification clearly was "makes a firm offer," but the time when the firm offer was to be made is not made clear. It must, it is submitted, mean that the purchaser is able and willing at the material time for completion of the contract. If the decision in *Bennett & Partners* v. *Millett* (3) has been over-ruled in the light of subsequent decisions, so also, if it was an offer "subject to "contract", has *Dennis Reed Ld.* v. *Nicholls* (2). *E. P. Nelson & Co.* v. *Rolfe* (4) was treated as being governed by the admission that under the contract commission was payable immediately on the introduction being made. In all those cases the court was never called upon to consider the question raised in the present case. Also they were cases where the vendor withdrew, and here it is the purchaser who has withdrawn.

Cur. adv. vult.

April 4. The following judgments were read:

BUCKNILL L.J. stated the facts and continued: I have set out the facts in considerable detail because, on reflection I think that they establish that the offer which in effect Himsley made and signed on May 20 was an unqualified offer to purchase the house on terms which the vendors were willing to accept and to which in effect they orally assented. So far as I can see, there was no effective reason why the vendors' solicitor should have advised them on May 20 not to sign the draft contract which Himsley had already signed. The clause as to the road charges seems to me to incorporate in

(1) [1920] 2 Ch. 574, 579.

(2) [1948] 2 All E. R. 914.

(3) [1949] 1 K. B. 362.

(4) [1950] 1 K. B. 139.

substance the result of the conversations between Himsley or the agent's representative and the vendors on the point. The case made for the plaintiff agents was that Himsley on May 20 made an unqualified offer in writing to purchase the house for a sum which had already been agreed between the parties, and on terms which were reasonable and acceptable to the vendors. The plaintiffs had therefore, on that date, introduced a person ready, able and willing to purchase the house, and the defendants were under an obligation to pay the sum which they had contracted to pay to the plaintiffs on introducing such a person.

After a prolonged and very careful hearing, the judge came to the following conclusions: (i.) the commission was due as soon as the introduction had been effected of a person possessing the qualities of readiness, ability and willingness on which the contract depends, and upon proof, so far as the court was concerned, by the plaintiffs that those conditions were fulfilled. (ii.) The qualities of readiness and ability, etc., must refer to some future time, because the agreement could not reasonably be interpreted as meaning that the person expressing his readiness to purchase had 2,825*l.* in legal tender in his pocket at that moment of time when he expressed his willingness to buy. (iii.) The proper time at which the court should decide whether the proposed purchaser was ready, able and willing to purchase is the time of the hearing. The judge summed up the matter thus: "Although the condition "of the qualities of the person introduced is to be judged as at "the time of the introduction, the proof of those qualities "must be extracted and given at the time of the hearing . . . . "If ability (to pay) is to be judged by power to perform the "act at the proper time, willingness should also be judged "by willingness to perform the act at the proper time. On "June 21 the proper time had not passed but the willingness "had."

Counsel for the plaintiffs argued that the decision of the judge was based on an erroneous interpretation of the critical words in the agreement sued on, and that the correct interpretation was that the commission was payable as soon as the agents had found a person who was on May 20 ready and willing to purchase the property as proved by signature to the agreement, and that he was in fact ready and able to purchase it because he owned assets sufficient to enable him to produce the purchase money at the time of completion of the contract of purchase. I think that there is considerable weight in this argument. It seems to me that the plaintiffs place an interpretation on the words which would in effect make them equivalent to words such as "upon introduction of a purchaser." I think that the words of this clause in question are intended to give to the agents a claim to commission in circumstances which fall short of the execution of an enforceable contract on both sides. I do not think it unreasonable that house agents should try to arrange for their claim to commission to be earned in some cases where a sale through their introduction of a person willing to purchase is not in fact effected. In my opinion, if the vendor had subsequently to May 20 refused to sell, while the purchaser remained willing and able to purchase, the commission would have been payable. The fatal defect in the plaintiffs' claim in this case, in my opinion, is that it was the purchaser and not the vendor who withdrew from the negotiations.

On the other hand, the plaintiffs' claim to commission is not established merely by showing that the person whom they introduced was able and willing to purchase the property at any one particular moment of time: they must prove that he was ready, able and willing to purchase up to the time when either an enforceable contract for the purchase of the house is made between the parties, or, alternatively, up to the time when the vendor refuses to enter into such a contract on terms on which the purchaser is willing to purchase and the vendor was at one time willing to sell. The judge decided that the conduct of the vendors in refusing to sign the draft agreement on May 20, and in failing to sign a contract before the purchaser retired from the transaction was not unreasonable. I agree with the judge's decision on that point.

I base my opinion in this case on the ground that Himsley, although ready, able and willing to purchase the house on May 20, changed his mind before the date for completion had passed, and that it was his conduct, and not the conduct of the vendors, which caused the negotiations to break down. He was therefore, in my opinion, not a person ready, able and willing to purchase the house within the proper meaning of those words in the contract of agency sued upon. In my judgment this appeal should be dismissed.

DENNING L.J. In this case a firm of estate agents claim to be entitled to full commission although they never succeeded

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in effecting a sale: they only introduced a person who made a qualified offer and who withdrew it before any contract was concluded. The house owner was not at fault at all, but nevertheless the agents claim commission. They rely on a document which the house owner signed; and the case really depends on the true interpretation of that document.

So many cases have now come before the courts on claims by house agents to commission that the document cannot, I think, be interpreted in vacuo. It must be interpreted in the light of the general law on the subject, which I will endeavour to state. When a house owner puts his house into the hands of an estate agent, the ordinary understanding is that the agent is only to receive a commission if he succeeds in effecting a sale; but if not, he is entitled to nothing. That has been well understood for the last 100 years or more: see *Simpson* v. *Lamb* (1), per Jervis C.J., and *Prickett* v. *Badger* (2), per Williams J. The agent in practice takes what is a business risk: he takes on himself the expense of preparing particulars and advertising the property in return for the substantial remuneration—reckoned by a percentage of the price—which he will receive if he succeeds in finding a purchaser: see *Luxor (Eastbourne) Ld.* v. *Cooper* (3).

No particular words are needed to create the relationship. All the familiar expressions "please find a purchaser," "find "someone to buy my house", "sell my house for me", and so on, mean the same thing: they mean that the agent is employed on the usual terms; but none of them gives any precise guide as to what is the event on which the agent is to be paid. The common understanding of men is, however, that the agent's commission is payable out of the purchase price. The services rendered by the agent may be merely an introduction. He is entitled to commission if his introduction is the efficient cause in bringing about the sale: *Nightingale* v. *Parsons* (4). But that does not mean that commission is payable at the moment of the introduction: it is only payable on completion of the sale. The house-owner wants to find a man who will actually buy his house and pay for it. He does not want a man who will only make an offer or sign a contract. He wants a purchaser "able to "purchase and able to complete as well": see *James* v. *Smith*, per Bankes L.J. (1); *Martin* v. *Perry & Daw* (2).

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(1) (1856) 17 C. B. 603.

(2) (1856) 1 C. B. (N. S.) 305.

(3) [1941] A. C. 108, 141–3.

(4) [1914] 2 K. B. 621.

Some confusion has arisen because of the undoubted fact that, once there is a binding contract for sale, the vendor cannot withdraw from it except at the risk of having to pay the agent his commission. This has led some people to suppose that commission is payable as soon as a contract is signed: and I said so myself in *McCallum* v. *Hicks* (3).

But this is not correct. The reason why the vendor is liable in such a case is because, once he repudiates the contract, the purchaser is no longer bound to do any more towards completion: and the vendor cannot rely on the non-completion in order to avoid payment of commission, for it is due to his own fault: see *Roberts* v. *Bury Improvement Commissioners* (4), and *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (5) per Lord Russell, and per Lord Wright. But if the vendor could show that the purchaser would not in any event have been able or willing to complete, he would not be liable for commission: see *British & Benningtons Ld.* v. *N. W. Cachar Tea Co.* (6), per Lord Sumner. When it is not the vendor, but the purchaser, who withdraws, the case is entirely different; for, even though a binding contract has been made, nevertheless, if the purchaser is unable or unwilling to complete, the agent is not entitled to his commission: *James* v. *Smith* (7); *Martin* v. *Perry & Daw* (2). The vendor is not bound to bring an action for specific performance or for damages simply to enable the agent to get commission; but, if he does get his money, he will probably be liable to pay the commission out of it. It only remains to add that, when no binding contract has been made, the vendor can himself withdraw at any time without being liable to pay commission: *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (8). A fortiori, if the purchaser withdraws, the vendor is not liable for commission.

It is against that background that we have to interpret this document. Some estate agents have recently put a special clause in their printed forms, and used special words in their confirming letters. Their object is to get commission if they introduce a person who makes an offer to buy on the named terms, even though it never becomes a binding contract. It often happens that a house owner puts his house into the hands of several agents, and that each of the agents introduces

(1) [1931] 2 K. B. 318 n.
(2) Ibid. 310.
(3) Ante, p. 271, 275.
(4) (1870) L. R. 5 C. P. 310, 326.
(5) [1941] A. C. 108, 126, 142.
(6) [1923] A. C. 48, 72.
(7) [1931] 2 K. B. 317 n.
(8) [1941] A. C. 108.

someone who makes an offer. According to the agents, the house owner is liable under this new clause to pay commission, not only on the one offer which he accepts, but also on the other offers which he refuses. This contention has actually succeeded in at least one case that has come before the courts, and the house owner has found himself liable to pay double commission: see *E. P. Nelson & Co.* v. *Rolfe* (1). In the present case the agents go further: they say that, once an offer is made by someone whom they introduce, they are entitled to commission even though it is withdrawn by him the next day. They say that, if the person introduced is ready, able and willing at the time of the offer, that is sufficient even if he thereafter becomes unable or unwilling.

The new clause has been described by judges of this court as "rather stringent" and "rather undesirable." If it has the effect for which the agents contend, these descriptions are not one whit too strong. When an agent gets an offer which the house owner does not accept, it might be quite reasonable for the agent to ask for his out-of-pocket expenses or even for a reasonable reward for his time and labour; but it is not reasonable for him to ask for full commission at the same rate as if he had actually procured a sale. The commission is a substantial remuneration, based not on the time, labour or money expended—which may be little—but on a percentage of the purchase price. Remuneration on such a scale cannot be justified except on the footing that it is to come out of the purchase money; and it should therefore in reason only be payable on completion of the purchase. I know that agents often say that they have earned their commission when they have done their part. But that is a fallacy: an agent does not earn commission as a labourer earns wages. Even though he has done his part, he does not become entitled to his commission until the purchase is completed.

It is necessary to consider the reasonableness of this clause, because if it is capable of two interpretations, one reasonable and the other unreasonable, we ought to give it the reasonable one. All the more so in this case because of the way in which the document came to be signed. The clerk to the estate agents went to see the housewife and asked her for particulars of the house which she and her husband wanted to sell. He wrote all the particulars down on a printed form, asked her to read them through, which she did, and then asked her to sign

(1) [1950] 1 K. B. 139.

the form. He told her that it was "merely a routine matter", and she signed it. The document in fact contained at its foot the special clause. The clerk admitted that he did not explain the meaning of it to her. She herself apparently did not notice it, but signed because she thought that the agents were "all right." The clerk did not leave her a copy of the form, so she did not know what she had signed. She certainly had no reason for thinking that she was committing herself to any other than the usual terms on which estate agents are employed. In this situation, if the clause does mean what the agents contend, it may well be that the courts would not enforce it. The courts might well say to the agents: "If you insert "stringent terms, giving you more than is reasonable, without "explaining what you have done, you shall not have the aid "of these courts to enforce them." But that would be a strong course to take, and the courts prefer to construe the terms so as to give them a reasonable effect: see *Lee & Sons (Grantham) Ld.* v. *Railway Executive* (1).

Upon consideration of this clause, I am satisfied that it is capable of a reasonable construction. The words "upon "your introducing" do not mean that commission becomes due at the moment of introduction: the introduction takes place when the order to view is given, and no one knows then whether the person introduced will like the house or not. The words "upon your introducing" therefore cannot signify the time when an agent becomes entitled to commission, but only the services to be rendered by the agent. They mean "In consideration of your introducing." Whom must the agent introduce? He must introduce "a person ready, able "and willing to purchase the above property for the sum of "2,825*l*. or such other price to which I shall assent." These words do not mean a person ready, able and willing "to make "an offer," or even "to enter into a contract:" they mean a person ready, able and willing "to purchase," that is, to complete the purchase. He must be a person who is "able" at the proper time to complete; that is, he must then have the necessary financial resources. He must also be "ready"; that is, he must have made all necessary preparations by having the cash or a banker's draft ready to hand over. He must also be "willing;" that is, he must be willing to hand over the money in return for the conveyance. This interpretation means that the special clause has practically the same effect as the usual terms on which an estate agent is employed. This is just as it should be; for, having regard to what took place when the housewife was asked to sign the document, I should not expect it to go beyond the ordinary understanding on these matters.

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(1) (1949) 65 T. L. R. 604.

So far, I have considered this particular clause only. But I would like to add that the various new clauses that have appeared seem to be capable of a similar interpretation. I can see no sensible distinction between instructions to "find "a purchaser," "find a party prepared to purchase," "find "a purchaser able and willing to complete the transaction," and "find a person ready, willing and able to purchase." The rights and liabilities of house owners in these cases should not depend on fine verbal differences. If estate agents desire to get full commission not only on sales, but also on offers, they must use "clear and unequivocal language": see *Luxor (Eastbourne) Ld.* v. *Cooper* (1), per Lord Russell. Such a claim is, indeed, so contrary to the ordinary understanding on these matters that I think that the estate agent who desires it should bring it specifically to the notice of the house owner and get his specific agreement to it. *E. P. Nelson & Co.* v. *Rolfe* (2) might at first sight appear to be against the views that I have expressed; but there it was admitted that Payne was a person "ready, willing and able to purchase," so the court was not called on to consider the meaning of the words. The later case of *Graham and Scott (Southgate) Ld.* v. *Oxlade* (3) seems to show that the admission was erroneous, because it was there held that a person who had made an offer "subject to contract" or "subject to survey" could not be said to be "willing" to purchase. It seems to follow that Payne, who had made no offer, not even an offer "subject "to contract," could not be said to be "willing" to purchase. *Graham and Scott (Southgate) Ld.* v. *Oxlade* (3) does not, however, decide at what time the purchaser must be willing. He must, I think, be willing up to the time for completion unless he has been previously absolved by the vendor's withdrawal from the contract. What *E. P. Nelson & Co.* v. *Rolfe* (2) does show, however, is that, if once this clause is given the stringent effect contended for by the agents, there is no implied term which will protect a reasonable vendor—for Mr. and Mrs. Rolfe were reasonable enough. The only solution is to

(1) [1941] A. C. 108, 129.

(2) [1950] 1 K. B. 139.

(3) Ante, p. 257.

give the clause itself a reasonable interpretation. The result of *Graham and Scott (Southgate) Ld.* v. *Oxlade* (1) is that the three cases at first instance of *Giddy and Giddy* v. *Horsfall* (2), *Bennett & Partners* v. *Millett* (3), and *Dennis Reed Ld.* v. *Nicholls* (4), can no longer be regarded as of authority; for in each of them the offer was " subject to contract."

Applying the interpretation which I have stated, I am of opinion that the agents here never introduced a person who was ready, able and willing to purchase. They introduced one Himsley, who was at the beginning willing to make an offer, willing indeed to sign a contract, but never willing to make an open offer or to sign an open contract; nor, as it turned out, willing to complete. He backed out before a contract was concluded, and the sale went off without any fault of the vendor. The agents are therefore not entitled to commission.

HODSON J. The terms of the contract are contained in a document prepared by the plaintiffs on a printed form giving particulars of the property to be sold and the answers to various questions, one of which gave a negative reply to the question: " are any road or paving charges outstanding? ". At the end of the document above the signature were the following words: " I hereby instruct you to find a person ready, " able and willing to purchase the above property for the sum " of 2,825*l.* or such other price to which I shall assent. Upon " your introducing such a person I will pay you commission " in accordance with the Incorporated Society's scale, i.e. " 5 per cent. on the first 300*l.* of the purchase price, 2½ per " cent. on the next 4,700*l.*, and 1½ per cent. on the balance. " I further authorize that, should you consider it desirable " so to do, you shall be at liberty to obtain and execute a " contract on my behalf."

The main question in the appeal turns on the construction of the last clause. The county court judge found that there was not at the material time a person willing to purchase. The plaintiffs found a person who, they contend, was ready, able and willing to purchase the property for the sum of 2,750*l.*, to which the vendors assented. On May 20, the purchaser signed a paper which contained an offer of the sum of 2,750*l.* This, the plaintiffs contend, was an unqualified offer upon the making of which commission became immediately payable. The offer was not immediately accepted by the vendors, since they desired to consult their solicitors before so doing. On June 21, before the offer was accepted, the proposed purchaser withdrew his offer. The vendors, through no fault of their own, as the county court judge found, gained no benefit from the contract of agency, since it was not they but the purchaser who withdrew; and it would seem surprising that a contract should be drawn so as to make them liable to pay commission in such an event. Moreover, if there is any ambiguity in the contract, it must be construed contra proferentem.

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(1) Ante, p. 257.

(2) 63 T. L. R. 160.

(3) [1949] 1 K. B. 362.

(4) [1948] 2 All E. R. 914.

Much turns on the time when the person referred to is to be ready, able and willing to purchase. There would appear to be three possible times when the readiness, ability and willingness must exist: (1.) the time of the introduction of the qualified person. This is the contention of the plaintiffs, who seek to synchronise the time of introduction with the moment when the offer was made, itself a proposition not without difficulty; (2.) the time of completion of the contract; (3.) the time when the contract for purchase was entered into. The last two are the alternative contentions of the vendors.

In support of their construction the plaintiffs argue that this contract is of the kind thus envisaged by Lord Simon in *Luxor (Eastbourne) Ld.* v. *Cooper* (1): " There is the class," that is to say the class of contract, " in which the agent is promised " a commission by his principal if he succeeds in introducing " to his principal a person who makes an adequate offer, " usually an offer of not less than the stipulated amount. " If that is all that is needed in order to earn his reward, it is " obvious that he is entitled to be paid when this has been " done, whether his principal accepts the offer and carries " through the bargain or not," although this passage must be read in conjunction with the warning words of Lord Russell in his speech in the same case. He said (2): " It is possible " that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to " purchase at the specified or minimum price; but such " a construction of the contract would in my opinion require " clear and unequivocal language."

The plaintiffs argue that the word " upon " in the contract is temporal, so that, when the offer was made, since the person

(1) [1941] A. C. 108, 120.

(2) Ibid. 129.

introduced had then the necessary qualifications of ability, readiness and willingness, they became immediately entitled to sue for their commission. It makes no difference, according to this argument, whether the willingness persisted. Whether the sale goes off or not, it is said that the agent can sue before the purchase is completed. Reliance was placed on a decision of Lynskey J. in *Dennis Reed Ld.* v. *Nicholls* (1), where the words of the contract of agency corresponded very closely with those in this case; and on the decision of the Court of Appeal in *E. P. Nelson & Co.* v. *Rolfe* (2). In these two cases, it is to be observed, the vendors withdrew before the contracts for sale were signed, and no question arose as to the point of time to which the willingness or other qualities of the purchaser related. Indeed, in the last-named case willingness and the other requisite qualities were admitted. At the time when the vendors drew back, the purchasers were still able and willing and there was no reason to draw any inference from the facts other than that the ability and willingness would persist until the time for completion arrived. These cases are not, therefore, authority for the proposition that the willingness need exist only at the time when the offer is made in pursuance of the contract of agency which is put forward in order to enable the agent to succeed. The agent was still entitled to succeed in those cases, because he had fulfilled his part of the bargain by introducing a person who fulfilled the required qualifications, and to bring his action before the time of completion or the time of execution of the contract for purchase. Similarly, in *Graham and Scott (Southgate) Ld.* v. *Oxlade* (3), attention was not directed to the period of time after the vendor had withdrawn.

Some reliance was placed on the decision of the Court of Appeal in *James* v. *Smith* (4), a case turning on the meaning of ability to purchase. There the sale went off because of the inability of the purchaser to find the price, and the agent was held not to be entitled to his commission. Atkin L.J. there said (5): "I think that 'ability' does not depend upon "whether the purchaser has the money in hand at the time; "to my mind it is a question of fact. I do not think it depends "upon whether he has a binding agreement by which some third "person is obliged to provide him with resources to carry out

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(1) [1948] 2 All E. R. 914.

(2) [1950] 1 K. B. 139.

(3) Ante, p. 257.

(4) [1931] 2 K. B. 317 n.

(5) Ibid. 322.

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"the contract. I think it is sufficient if it is proved by the "agent or by the purchaser that the circumstances are such "that if the vendor had been ready and willing to carry out "his contract, he on his part at the proper time could have "found the necessary money to perform his obligation."

From this it appears that the ability to find the money at the proper time, even though capable of proof in a variety of ways, means ability to find it at the time of completion. It is logical to read all the necessary qualities as bearing on that time. Moreover, the word "purchaser" of itself denotes completion of purchase, as was pointed out by Hilbery J., in *Bennett & Partners* v. *Millett* (1), although the word may be qualified by other words used in connexion with it. It is unnecessary to decide whether the word purchase in this contract has its primary meaning of completion of purchase or its secondary meaning of contract to purchase, since the purchaser withdrew his offer on June 21, 1949, before either event took place.

On my reading of the contract, the word "upon" in the phrase "upon your introduction" is properly to be construed in a causal sense and not temporally. The sale of the property having gone off by reason of the fact that on June 21 the purchaser ceased to be willing, in my opinion, on a true construction of the contract of agency dated May 11, the appeal fails, since the purchaser was on the evidence not willing at the proper time.

In my judgment, the appeal also fails on other grounds. In order that the plaintiffs should succeed on the construction contended for by them, which I have rejected, they must in any event prove that the offer was an unqualified offer and within the terms contained in the contract of agency. The offer dated May 20, 1949, begins by setting out the names of the parties, recites the particulars of the property, and goes on to provide for the payment to the agents of the deposit money, the date for completion and vacant possession. It also deals with the rights and claims to which the vendor is or may be entitled in development value in respect of the restricted user under the Town and Country Planning Act, 1947, and the vendor is described as covenanting with the purchaser to do everything necessary to enforce any rights which he may have under the Act.

(1) [1949] 1 K. B. 362.

Finally, at the end of this document there appears this paragraph: "It is clearly understood that the purchaser is "purchasing on the understanding that the road charges are "paid in respect of the property, or, if not, the vendor will "indemnify him against any road charges which may be "outstanding." If the offer was qualified, the purchaser was not willing: see the judgment of the Court of Appeal in *Graham and Scott (Southgate) Ld.* v. *Oxlade* (1), where it was held that offers subject to contract or subject to survey take the offerors outside the category of willing purchasers. In this case, in my judgment, the qualification as to indemnity in respect of road charges is sufficient to take the purchaser out of the category of willingness notwithstanding that the vendor had already given a negative reply to the question: "are there any road or paving charges outstanding?"

Further, the only contract which the plaintiffs were empowered to enter into with the purchaser on behalf of the vendors was an open contract, in which only the parties, property and price were settled. The offer which was prepared by the plaintiffs and signed by the purchaser goes beyond this in various respects, first as to the provision for deposit, secondly as to the road charges, thirdly in connexion with rights under the Town and Country Planning Acts, and fourthly in the fixing of the date for vacant possession and completion. Readiness, willingness and ability to purchase must have relation to the vendor. The vendors in this case gave no authority to the agent for the inclusion of these terms, and until he had assented to the new terms no offer within the scope of the principal's authority had been given. It is no answer to say that the terms were acceptable or ought to have been acceptable to the vendors. It was reasonable in any event for the vendors to have an opportunity of consulting their solicitors before entering into a contract for a sale of land, which is the very course they took on the offer of May 20 being made to them.

On these grounds, also, in my judgment the appeal fails.

Appeal dismissed.

Solicitors: *Hardcastle Sanders & Co.*; *Cameron, Kemm & Co.*

A. W. G.

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(1) Ante. p. 257.

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May 3, 4.

Evershed M.R. Asquith and Jenkins L.JJ,

HABERMAN *v.* WESTMINSTER PERMANENT BUILDING SOCIETY.

[Plaint No. E. 2786]

Landlord and Tenant—Agreement for lease of flat subject to Rent Restriction Acts—Premium payable by lessee—Further legislation prohibiting premiums—Recoverability of premium by tenant—Option to avoid agreement—When exercisable—Landlord and Tenant (*Rent Control*) *Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 2, *sub-ss.* 1, 3, 5.

By s. 2 of the Landlord and Tenant (Rent Control) Act, 1949, in the case of the grant, renewal or continuance of a tenancy of a dwelling-house to which the principal Acts apply, premiums may no longer be required.

By sub-s. 5 certain premiums shall be recoverable by the person by whom they were paid; and by a proviso to that sub-section if an agreement made since March 25, 1949, includes provision for the payment of a premium which could lawfully be required under the enactments thereby repealed, but which, if paid in pursuance of the agreement, would be recoverable wholly or in part by virtue of the foregoing provisions of the sub-section, the agreement shall be voidable at the option of either party thereto.

The option thus given to avoid an agreement is, on the true construction of the sub-section, not exercisable when the premium has already been paid.

Appeal from Willesden county court.

On March 30, 1949, a company entered into an agreement with a tenant to let to him a flat to which the Rent Restriction Acts, 1920–1939, applied for fourteen years from April 24, 1949, at a rent of 6*l.* 9*s.* 0*d.* a month, together with a premium of 400*l.*, which was duly paid by the tenant on April 4, 1949; and on that date a formal lease and counterpart were exchanged between the parties. On April 23, 1949, the tenant took possession of the flat. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into force. Having regard to the provisions of s. 2 of that statute (1) the tenant,

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(1) Landlord and Tenant (Rent Control) Act, 1949, s. 2, sub-s. 1: "A person shall not, "as a condition of the grant, "renewal or continuance of a "tenancy to which this section "applies, require the payment "of any premium in addition to "the rent."

Sub-section 3: "This section "applies to any tenancy of a "dwelling-house, being a tenancy "to which the principal Acts "apply, such that when the "dwelling-house is let under the "tenancy it is a dwelling-house "to which the principal Acts "apply."

Sub-section 5: "Where, under "an agreement made after the "25th day of March, 1949, any "premium has been paid which,

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on August 16, 1949, demanded the return of the premium. On the following day the landlords' solicitors wrote a letter to the tenant stating that if he persisted in demanding the return of the premium they claimed to avoid the lease under the proviso to sub-s. 5 of s. 2 of the statute, and would evict him from the premises. On November 1, 1949, the tenant began proceedings in the county court against the landlords, demanding the return of the premium: and the landlords counterclaimed possession on the ground that the tenant no longer had any right to remain in the flat. Both before and after lodging his plaint, until January, 1950, the tenant continued to pay and the landlords continued to accept the monthly rent.

The county court judge held that the action for the return of the premium succeeded, and that the counterclaim also succeeded; and he made an order against the tenant for possession of the premises.

The tenant appealed.

Montague Waters for the tenant. It is conceded that under s. 2, sub-s. 5, of the Act of 1949 either party is given an option to avoid the lease. It is contended that it is now too late for the landlords to avoid the lease, as they must be deemed by their conduct to have affirmed it. The case is analogous to that of forfeiture for breach of covenant in a lease. The law as to forfeiture is very strictly applied. Where a contract is voidable, once it has been affirmed the right to avoid is gone. The landlords were not entitled to say in this

" or the whole of which, could " not lawfully be required under " the foregoing provisions of this " section (or, if the premium was " required before the commencement of this Act, which could " not lawfully have been required " if this Act had then been in force), " the amount of the premium, " or so much thereof as could " not lawfully be required or " have been required, as the case " may be, shall be recoverable " by the person by whom it was " paid:

" Provided that where an agreement has been made since the " said 25th day of March and " before the commencement of " this Act, and the agreement " includes provision for the payment of a premium which " could lawfully be required under " the enactments hereby repealed " but which, if paid in pursuance " of the agreement, would be " recoverable, wholly or in part, " by virtue of the foregoing " provisions of this subsection, " the agreement shall, without " prejudice to the operation of " this section, be voidable at " the option of either party " thereto."

case : "If you ask for the return of your premium, we will "exercise our option to avoid the lease." The acceptance by the landlords of rent after the issue of the writ was not a neutral act, and was only consistent with the existence of the lease. The landlords had to elect whether they would affirm the lease or not. They elected, by accepting rent, to affirm it, and they cannot now avoid it. If the tenancy is avoided, a statutory tenancy arises in its place. The Rent Restriction Acts having been passed to protect the tenant, any doubt should be resolved in favour of the class of persons intended to be benefited by those statutes. [He referred to Halsbury's Laws of England, 2nd ed., vol. 13, pp. 207, 208; *Stackhouse* v. *Barnston* (1); *Williams* v. *Stern* (2); *Croft* v. *Lumley* (3); *Ex parte Moore* (4); *In re Thompson and Holt* (5); *Selwyn* v. *Garfit* (6); *Samuel (P.) & Co.* v. *Dumas* (7); and *Hemmings* v. *Sceptre Life Association Ld.* (8).]

L. A. Blundell for the landlords. The question is whether a transaction such as this can be set aside where a person has paid rent and a lease has been executed. On the true construction of this proviso the draftsman is looking back to the date on which the agreement was concluded. The proviso shows that the premium was retrospectively recoverable. Subsection 5 is applicable to cases where the premium has been paid as well as to those where it has not been paid, and the landlords are thereby empowered to exercise the option and avoid the agreement in spite of the fact that the premium has already been paid.

ASQUITH L.J. This is a tenant's appeal against a judgment upholding the landlords' counterclaim and granting the landlords an order for possession of a flat let by them to the plaintiff. The tenant had been awarded 400*l.* on his claim, which was practically uncontested and which is not the subject of appeal.

The facts are simple and not in dispute. [His Lordship stated the facts and continued :—] The Landlord and Tenant (Rent Control) Act, 1949, came into operation on June 2, 1949. Inter alia, it made any demand for payment of premiums in respect of tenancies within the economic limits of the

(1) (1805) 10 Ves. 453.
(2) (1879) 5 Q. B. D. 409.
(3) (1855) 5 E. & B. 648.
(4) (1876) 2 Ch. D. 802.
(5) (1890) 44 Ch. D. 492.
(6) (1887) 38 Ch. D. 273.
(7) [1924] A. C. 431.
(8) [1905] 1 Ch. 365.

Rent Restriction Acts illegal in certain cases where the Rent Acts previously in force had not prohibited such payments, for instance, in the case of tenancies of fourteen years and upwards. The present tenancy is a tenancy for fourteen years. It also made premiums actually paid recoverable. True, the present agreement of tenancy was made and became operative before the Act received the Royal Assent, but some of its provisions, notably certain provisions in s. 2, are retrospective, and it is with the possible application of those provisions that we are concerned in this case.

[His Lordship read s. 2, sub-ss. 1, 3 and 5, and continued :]

This is a tenancy to which s. 2 applies, and the question is what is the effect on it of the proviso to sub-s. 5 ? The main part of the sub-section enables the tenant to recover on his claim the premium of 400*l.* which he had paid. The landlords in their counterclaim relied on the proviso as entitling them to possession. They claim to have exercised validly the option conferred by the proviso and so to have avoided the agreement of tenancy.

By August 16, the Act having then come into force, the tenant realized that the Act entitled him to repayment of the premium which he had paid, and his solicitor demanded it by letter of that date. The landlords, after disputing at first his right to it, later withdrew their opposition, but by August 26 they in their turn had realized that the proviso existed, and they wrote to the tenant, in effect : "If you "recover your premium we shall avoid your tenancy."

On November 3, 1949, the tenant lodged his plaint. Both before and after lodging it, and before and after the counterclaim had been filed, indeed, right up to January, 1950, the tenant continued to pay and the landlords continued to accept the monthly rent. It was on December 15 that the landlords filed their defence and counterclaim, claiming possession on the basis which I have stated. In para. 3 of their counterclaim they purported to exercise the option conferred by the proviso to avoid the agreement. In his reply and defence to the counterclaim, the tenant denies that the landlords have any rights under s. 2, sub-s. 5, and alternatively claims to be entitled to remain in possession as a statutory tenant.

I now pass from the undisputed facts and the pleadings to the argument and the conclusion of the county court judge. The argument turns entirely on the construction of the proviso.

The judge has held that it applies to the facts of this case, that it vested in the landlords an option to avoid the tenancy, that this option was validly exercised by the landlords, and that the landlords did not waive their rights by accepting rent, or otherwise.

The tenant below and in this court relied in substance on three contentions. He argued first that the proviso (as I will call it for short), which confers the option to avoid certain agreements, only applies to agreements which have not in any degree been performed, or, at all events, to agreements in respect of which, though a premium has been stipulated, the premium has not in fact been paid. In the present case, he said, long before the attempted exercise of the option the premium had been actually paid, the lease had been executed, and possession had been taken.

He relies, in support of the limited construction for which he contends, mainly on the last few words of the following phrase: "Provided . . . . the agreement includes provision "for the payment of a premium which could lawfully be "required under the enactment hereby repealed but which" —and now come the significant words—"if paid in pursuance "of the agreement, would be recoverable, wholly or in part, "by virtue of the foregoing provisions of this sub-section." The words "if paid . . . . would be recoverable" must surely mean "if it had been paid," and implies that the proviso is limited to cases in which it is not paid. The alternative construction really involves writing in after the words "would "be recoverable" some further words, such as "or has been "paid and therefore is recoverable," or "whether or not "such premium has in fact been paid." But no such words are in the sub-section. Indeed, as the Master of the Rolls pointed out at one stage of the argument, if the construction contended for by the landlords is right, the draftsman might have saved himself a lot of pains by simply writing "includes "provision for the payment of a premium recoverable under "the foregoing provisions of this sub-section." The words "which . . . . if paid . . . . would be recoverable" would then have been a quite unnecessary rigmarole.

This argument of the tenant assumes that the agreement referred to in the proviso is not a lease such as in this case was executed after and in pursuance of the precedent oral agreement, but was that oral agreement itself. It was put to counsel for the tenant that a lease was, inter alia, an agreement:

hence the proviso may apply to a lease. But he countered this successfully, in my view, by pointing out that the lease in this case, even though an agreement, was not an agreement which provided for payment of a premium, a subject on which it was wholly, and no doubt advisedly, silent. I agree with counsel that the material agreement in this case was the oral agreement of March 30, the terms of which are set out in the receipt of that date. It was an agreement whereby, in exchange for a premium of 400*l.* to be paid by the tenant, the landlords agreed to give him a lease of fourteen years at the rent of 6*l.* 19*s.* 0*d.* per month.

The construction for which the tenant contends has another incidental advantage. If the proviso extends beyond executory agreements to agreements in actual operation or with a premium actually paid up, the question arises at what point in time the option to avoid the agreement becomes exercisable. The proviso is silent on this point. Suppose that a tenant, after paying the premium, remained in occupation under a lease for ten years, paying rent regularly: could the landlord then suddenly turn round, avoid the agreement and oust him. Or are we forced to say that the right is only exercisable within a reasonable time after some terminus a quo, and if so from what terminus a quo—the passing of the Act or the realization by the party of his rights? But if the right is limited to executory agreements and only subsists so long as they remain executory, then the moment when, by payment of the premium or otherwise, they are in part performed the option ceases, and everybody knows where he is.

There is another argument, which I consider merely to put it aside as indecisive: it will have been noticed that towards the end of the proviso the words occur, "without "prejudice to the operation of this section." In the result those words appear to me to be too obscure really to assist either of the rival constructions put forward.

Mr. Blundell has suggested that their object is to show that if a premium has been paid under an agreement avoided by the proviso the fact of its avoidance is not to preclude the tenant from recovering his premium. If that were its object, of course, the presence of the words in the proviso is consistent with Mr. Blundell's suggestion that the proviso applied to cases where the premium had in fact been paid as well as to cases where it had not. But, as Jenkins L.J. has pointed out, the words might have been inserted for a

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different purpose: the phrase might mean that if, instead of avoiding the contract, a tenant pays the premium, he is not to be met, when he claims repayment of it, with the argument that avoidance was his only remedy and that he has forfeited his right to recover it back. Therefore the phrase, according to which of those two views is the true one, is consistent either with the construction of the proviso which limits its application to executory contracts, or with a construction which extends its application to cases where, indeed, the premium has been paid. It remains obstinately neutral and unilluminating.

For these reasons, among others, but mainly for that based on the words "if paid", I am of opinion that the proviso does not apply to this case where the premium has been paid and the agreement fully executed, and that the judge was mistaken on this point. Since no option to avoid the tenancy exists except in the event of the proviso applying, this is sufficient to entitle the tenant to succeed.

Mr. Waters relied on certain other arguments, and, as he argued them with much skill, I think that I should deal with them briefly. He had a second and third point. The second point arises only if the first point which I have just decided is wrong; and the third point arises only if the first and second points are wrong. The second point is this: he says that the option to avoid the agreement is comparable to, and governed by, the same incidents as the election to which a landlord is put on a "forfeiture"—a breach of covenant by the tenant which entitles the landlord to re-enter. Among the incidents of a forfeiture is that the right to re-enter is waived if an unequivocal act on the part of the landlord affirms the continued existence of the tenancy—an act done at a time when he knows of the breach of covenant, the commonest instance being, of course, unqualified acceptance of rent with such knowledge.

Here it is said that the landlords discovered their right under the Act to avoid the tenancy at the latest by August 26, since by then they were threatening to exercise that right. Yet they accepted rent not only on September 21 and October 23, but on November 23—that is, three weeks after the plaint had been issued—and again in December after the counterclaim had been filed, and again in January. If they had an option, it is argued that they waived their right.

On the view which I take on the first point, that they had no option, it is unnecessary to decide this issue, but, if it were necessary, I should hesitate very much to decide it in favour of the tenant. The incidents of this statutory option given by the proviso—given both to landlord and tenant, and exercisable by either of them irrespective of any wrongful act done by the other—need not, it seems to me, be the same as the incidents which govern the rather narrow specialized rules relating to forfeiture, with their uni-lateral operation and the necessity of a breach of covenant to set the process in motion. Those were the sort of consideration, though not the exact considerations, which impelled the county court judge to reject the tenant's argument under this head, and I think that he was right. No doubt the right to avoid could be waived, but I do not consider that it would be waived by, say, the acceptance of a single month's rent after the optionor had discovered his rights, as it would be in the case of a forfeiture. True, several months' rent was paid and accepted, but this was mostly at a time when it was quite uncertain whether the landlords would disgorge the premium, and the continued acceptance of rent where the circumstances were in such a fluid state could hardly, I should have thought, amount to an act unequivocally affirming the tenancy and electing not to avoid it. Therefore, I think that the second argument of the tenant fails.

His third and last contention can be disposed of more briefly. He claims, on the footing that he was wrong on both of the preceding points, that, if his contractual tenancy was avoided by a valid exercise of the option in December, 1949, his statutory tenancy sprang up in its place. This surely cannot have been intended. What would be the use of enabling a party to avoid a tenancy and entitling him, prima facie, to say to his tenant "you must leave," if the automatic result of exercising that option would be to confer on the tenant not only the right to stay on but a status of comparative irremovability? It should be remembered that no part of s. 2 applies to any premises to which the Rent Restriction Acts do not apply. Therefore, on the view which I am criticizing, in every case where the option to avoid could be and was validly exercised by the landlord, he would fail to oust the tenant, and the Rent Restriction Acts would take away with the left hand what the Rent Control Act by this proviso gives with the right hand. But I also think that the judge was right in saying that the effect of avoidance of the contractual lease is to destroy it ab initio as never having existed. If it never had existed there could be no contractual tenancy on its cessation, and no statutory tenancy under the proviso. The contractual tenancy is not stated to be determinable on exercise of the option: it is stated to be voidable, and it is entirely destroyed.

For these reasons, I think that the first point succeeds, and that the appeal should be allowed.

JENKINS L.J. I agree. I confess that, as a matter of first impression, I was attracted by the effect given to the proviso by the judge, and supported before us by Mr. Blundell. In legislation retrospectively enabling one party to a bargain to recover part of the consideration, although, at the time when he gave it, the bargain was perfectly lawful, one would expect, in fairness to the other party, a provision to the effect that he, being deprived of part of the consideration agreed upon, ought at his option to be able to relieve himself of the burden which he undertook in return for the consideration in question. On those general grounds one might, prima facie, have expected the proviso to s. 2, sub-s. 5, of the Act of 1949 to give a landlord a right of avoiding the bargain in every case in which a premium, for the first time made unlawful by the Act of 1949, became recoverable by virtue of that Act.

On reflection, it is found that the matter is not so simple as that. If the proviso were indeed enacted in that general form, the result might well be that many an unfortunate tenant, who had lawfully and properly paid a premium with a view to securing much-needed accommodation, would, by the passing of a retrospective enactment undoubtedly designed to protect him, find himself at risk of being evicted, with the perhaps wholly inadequate consolation afforded by the right to recover his premium.

I have made these prefatory observations because I think they do indicate that the questions of policy, if I may so describe them, involved in the construction of this proviso are not so one-sided as they would at first sight appear to be. A further general consideration is that, as Asquith L.J. has pointed out, the construction of the proviso adopted by the judge would give rise to quite extraordinary difficulties as regards the time within which the right of avoiding the agreement was to be exercisable and as regards the effect of any creation of rights in third parties by way of subletting, and so forth; and, in fact, all manner of difficulties. In particular, as regards time, the right would be one to which it would be difficult to put any exact term. It might be exercised, apparently, at a quite indefinite distance of time. There is, therefore, as it seems to me, to put it at the lowest, no general ground for preferring the construction placed on the proviso by the judge to that contended for by the tenant.

Treating the matter, therefore, simply as a matter of the construction of sub-s. 5 and the proviso, I, for my part, find myself driven to the conclusion that the proviso does not extend to agreements under which the premium has been actually paid. Asquith L.J. has pointed to the vital words, "which, if paid in pursuance of the agreement, would be "recoverable, wholly or in part, by virtue of the foregoing "provisions of this sub-section." It seems to me that those words state as clearly as language well can that the premium, to which the proviso refers, is one agreed to be paid and not in fact paid.

I would add that I consider this conclusion reinforced when the mode of expression used in the proviso is compared with the mode of expression used in the body of the sub-section. The body of the sub-section is expressed to deal with cases "where, under an agreement made after March 25, 1949, "any premium has been paid," and it makes any such premiums recoverable. It is concerned with premiums which have been paid. The proviso is framed in an entirely different way. It does not purport to be concerned with premiums which have been paid, but with the case where an agreement has been made since March 25, 1949, and before the coming into force of the Act, and the agreement includes provision for the payment of a premium. That seems to me to be a very significant change of language, and I think it really incredible, in view of that change, that the proviso should in truth have been intended to refer to cases in which the premium had been paid. If that had been the intention, it could have been achieved with a much greater economy of language.

It seems to me that the proviso read in conjunction with the body of the sub-section makes it plain that cases, in which a premium has been paid having been referred to in the body

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of the sub-section, the proviso concerns a special class of case, namely, that in which an agreement has been made since March 25, 1949, but before the coming into force of the Act, and is still an agreement and nothing more. In those circumstances, where there is an agreement under which a premium payable but not yet paid would, if paid, be recoverable by virtue of the Act, and only in those cases, the proviso confers the option on either party to avoid the agreement.

For these reasons, in addition to those given by Asquith L.J., I agree that the appeal should be allowed on the first issue.

EVERSHED M.R. I am also of the same opinion and think that this appeal should be allowed.

The first point (on which I think Mr. Waters is entitled to succeed) is one purely of construction of the proviso to s. 2, sub-s. 5, of the Landlord and Tenant (Rent Control) Act, 1949. Neither Mr. Waters nor Mr. Blundell has found anything in the books which would help us by reference to any similar words in any similar statute. The grounds which have impelled me to a conclusion different from that of the judge have been fully stated by my brethren. I entirely agree with their reasoning, and it would be a waste of time if I, out of respect for the county court judge, were to travel again over that ground. I add only this: the judge was affected, and not unnaturally, by what he considered a capricious result if the right of the landlord were to depend on the accident whether a premium had or had not been paid in fact. But it is to be remembered that in this branch of the law a substantial distinction has always been recognized between agreements which are purely executory and agreements which have been completed by the grant of a lease or a conveyance. Therefore, if there be any validity in the view that the distinction may work capriciously, it is, at any rate, a distinction which seems to a lawyer to be not unnatural. In my judgment, as I have said, the appeal should be allowed, with the result, as I follow it, that the landlords' counterclaim will stand dismissed.

Appeal allowed.

Solicitors: *Matthew Trackman & Co.; Arnold Lee & Co.*

J. L. D.

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Bucknill, Somervell and Denning L.JJ.

Landlord and tenant—Wife statutory tenant absent in Ireland through prolonged illness—Intention to return when health permitting—Wife in occupation of premises—Suitable alternative accommodation—Ability to buy or build another house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1.

A married woman was the statutory tenant of a house about twenty-five miles from Manchester, where her husband worked. In 1940, when her husband went on service, she sub-let the house furnished and herself went to live in Ireland. She suffered from tuberculosis. In 1945, when the husband was demobilized, the wife gave notice to the sub-tenant who left the house; but the wife had a hæmorrhage, and her medical advisers considered that she should not return to England. Since that date she had only resided in the house for three months in 1947. She proposed to go there each year in the summer, but she had not been well enough. The husband resided with his mother in a town near Manchester, and he stayed at his wife's house for two or three weeks each year, and also for some week-ends and odd nights. A whole-time man-servant was employed at the house, who kept it ready for occupation at any time. In 1948, the wife had installed at the house a new copper boiler. The advice of the wife's medical advisers was that she should not return to the premises permanently until her health further improved, or living conditions became better in England. The evidence of the husband was that it was the intention of his wife and of himself to return to live at the house when her health permitted, and, pending her cure, to reside there in the summer months provided that her medical advisers agreed.

Held, that the wife was in occupation of the house as a statutory tenant, since it was clear that she intended to return there to live when her health improved.

Judgment of Scrutton L.J. in *Skinner* v. *Geary* [1931] 2 K. B. 546 applied.

Appeal from Leek county court.

The facts as stated by Bucknill L.J., were as follows: The defendant Mrs. Vida Mary Leigh, was at all material times the statutory tenant of a house known as "The Hut," of which the plaintiffs were the landlords. She was a married woman, and up till 1940 she and her husband were living in the house. He carried on his profession in Manchester, and the house was about 25 miles away from the town in the open country and was a suitable place for their residence. In May 1940, he was sent as a soldier to the Orkneys, and his

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wife then went to Ireland to live with friends whilst he was away. They sub-let the house furnished. He continued to serve in the Army until he was demobilized in 1945, and his and his wife's intention was then to return to the house. They gave notice to the sub-tenant to quit, and the sub-tenant left.

While he was on his way home, his wife had a hæmorrhage, and the doctors refused to allow her to go back to the house. She had suffered from pulmonary tuberculosis before 1945, and presumably had been temporarily, at any rate, cured. From that date she had in fact only lived in the house once, for three months in the summer of 1947. Her husband said that his wife intended to go over each year in the summer; that she had not been well enough; but that it had always been his and his wife's intention to go and live at the house when her health permitted, and, pending her complete cure, to go there in the summer months, provided that the doctors agreed to it.

Meanwhile, the husband himself had been living with his mother at Wilmslow, but had been going from time to time to the house. He said in evidence that he generally stayed there for periods of two to three weeks each year, and spent some week-ends there, and odd nights. He occasionally had taken a friend there. They employed a man for the whole of his time. He kept the beds aired and the house ready for occupation. They had spent a considerable sum of money on the upkeep of the house, and in 1948 the wife spent 65*l.* in putting in a new copper boiler. The year before she had a telephone extension put into her bedroom. The advice given by her medical advisers was that she should not return to the premises permanently until her health further improved or living conditions in England sufficiently improved.

The plaintiffs sued for possession of the house, and Judge Tucker made an order, holding that the tenant was no longer in occupation of it. He said that she was not living in or occupying the house as her home, was not an occupying tenant, and had no intention of returning to live there within any time that could be estimated. In the alternative, the judge said, suitable alternative accommodation was available for the tenant at the furnished lodgings at which she was living in Ireland and for the husband at the home of his mother, where he was living.

The tenant appealed on the ground that there was no evidence on which the judge could properly come to that conclusion.

Fearnley-Whittingstall K.C. and *Openshaw* for the tenant. It is plain on these facts that the wife, the statutory tenant, intended to return to the house to reside there permanently, as soon as her medical advisers did not advise against it, and meanwhile, when she could, to reside there in the summer months. As Scrutton L.J. said in *Skinner* v. *Geary* (1): "The Act does not, in my opinion, apply to protect a tenant "who is not in occupation of a house in the sense that the "house is his home and to which, although he may be absent "for a time, he intends to return." Here, the tenant was absent for a time through illness, but all the evidence shows that she intended to return to the house as her home. The trial judge decided for the landlords, in the alternative, on the ground that suitable alternative accommodation was available. But suitable alternative accommodation contemplates accommodation in a single dwelling-house: *Sheehan* v. *Cutler* (2), and see the judgment of Scott L.J., in that case. [He was stopped.]

Scott Cairns K.C. and *Shorrock* for the landlords. Except for three months, the tenant had been absent from this house for more than eight years, and the question was one of fact for the county court judge. There was complete uncertainty as to when, if ever, this statutory tenant would return to the house. There was, admittedly, no evidence that she was unlikely to recover; on the other hand, there was no indication of when she would recover and no evidence from her medical man on that issue. Meanwhile, the house remains empty except for the occupation by the husband for some three weeks and an odd day or two in each year. In effect, the house is withdrawn from available home accommodation, and the policy of the Rent Restriction Acts is defeated.

To establish occupation, there must be some physical possession of the home: *Brown* v. *Draper* (3), *Brown* v. *Brash and Ambrose* (4), *Robson* v. *Headland* (5), and *Baldwin* v. *Gurnsey* (6). There was ample evidence to justify the findings of the judge that the tenant was not living in or occupying the house as her home, was not an occupying tenant, and had no intention of returning to live there within any time that could be estimated. The intention to return to the house,

(1) [1931] 2 K. B. 546, 564.
(2) [1946] K. B. 339.
(3) [1944] K. B. 309.
(4) [1948] 2 K. B. 247.
(5) (1948) 64 T. L. R. 596.
(6) [1949] 1 K. B. 102.

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it is submitted, must be one which it is reasonably practicable to carry out.

The point was put before the trial judge that if it is clear that a statutory tenant has adequate means to build himself a house, that is suitable alternative accommodation.

Fearnley-Whittingstall K.C., was not called on to reply.

BUCKNILL L.J. Before looking at the facts, I propose to state very shortly the principles on which the court may act in granting possession to the landlord of a rent-restricted house on grounds such as those on which the judge has acted. The leading case on the subject is that of *Skinner* v. *Geary* (1), and the judgment most frequently referred to is that of Scrutton L.J. It is not necessary to state the facts in that case, except to say that there the tenant had for the previous ten years been living elsewhere with his wife—some ten miles away—and that at no time did he contemplate residing in the house again. On those facts, Scrutton L.J., had some remarks to make in general which are applicable to this case. He said (2): "A non-occupying tenant was, in my opinion, never within "the precincts of the Acts, which were dealing only with an "occupying tenant who had a right to stay in and not be "turned out. This case is to be decided on the principle that "the Acts do not apply to a person who is not personally "occupying the house and who has no intention of returning "to it. I except, of course, such a case as that to which I have "already referred—namely, of temporary absence, the best "instance of which is that of a sea captain who may be away "for months, but who intends to return, and whose wife and "family occupy the house during his absence." Then again, he said (3): "For the reasons I have given the Act does not, "in my opinion, apply to protect a tenant who is not in "occupation of a house in the sense that the house is his "home and to which, although he may be absent for a time, "he intends to return. If it were to be held otherwise odd "consequences would follow." One could reverse that statement and say that if he is in occupation of the house in the sense that the house is his home then he is protected.

The trial judge, in making a careful note of his judgment, for which this court is greatly obliged, had those statements of the law before him, and he refers to them. He said:

(1) [1931] 2 K. B. 546.
(2) Ibid. 561.
(3) Ibid. 564.

" But on careful consideration of the whole of the evidence, " including the above-mentioned and the rest of the evidence " before me, and including also the admitted facts, I was of " opinion and found that the defendant was not living in or " occupying the house as her home and was not an occupying " tenant and had no intention of returning to live there within " any time that could be estimated." With due respect to the judge, I am of opinion that the facts did not justify that conclusion.

[His Lordship stated the facts and continued :] In my opinion there is no doubt that the tenant and her husband were regarding the house as their home, and that they intend to go there when the tenant is well enough to do so. With regard to the advice of her medical men, " that she should " not return to the premises permanently until her health " further improved or living conditions in England sufficiently " improved," there does not seem to me any reason to suppose that her health will not improve, and I hope that there is no reason for saying that living conditions in England will not improve in the future. I take that to mean, in this particular case, the condition as regards milk and butter and other foods which people suffering from this complaint need.

That is the position, and in those circumstances it seems to me that the wife is in occupation of this house because she has clearly the intention to return. That intention is not unreasonable, and there is no sufficient reason to suppose that she will not return within a reasonable time. That being so, it seems to me that the principle in *Skinner* v. *Geary* (1) has no application to this particular case.

As regards the policy of the Rent Restriction Acts, it is true that if a person is not in occupation of a house he is in effect keeping other people, who need a home, out of it. But I think it would be bad policy if in a case of this kind a home occupied so far as it could be by a husband and wife had to be taken from them merely because the wife was suffering from this ailment.

I pass to the other question, that of alternative accommodation. The judge has said that, if he were wrong on the first point, he thought that suitable alternative accommodation was available for the tenant at the address where she was living in Northern Ireland and for her husband at his mother's house where he was living. But it seems to me, on the face

(1) [1931] 2 K. B. 546.

of it, unreasonable to suggest that alternative accommodation is secured by providing the wife with furnished lodgings in Northern Ireland and the husband with a room in his mother's house. The burden was on the landlord to show that there was alternative accommodation available. He has not shown anything of the kind. Putting it at its highest, a witness was called to say that a house from time to time came into the market and could be bought, but at what price does not appear; nor that it is in a place as suitable as the house in question. I think that the landlord has failed to prove any reasonable alternative accommodation, and for these reasons I think that this appeal should be allowed.

SOMERVELL L.J. I agree.

DENNING L.J. There are many cases where a husband is, by force of circumstances, not able to live in the matrimonial home but is nevertheless protected by the Acts. The naval man who is away for two or three years at sea or the soldier who is taken prisoner in the war does not lose the protection of the Acts, and his wife cannot be turned out. So also if the husband becomes a chronic invalid and is removed to hospital. So here, although the wife is away because of illness, nevertheless the house remains the matrimonial home. They have no other home; and they have kept it ready for occupation in the hope that the wife will be cured and come to live there. The husband sleeps there occasionally, and it is all kept in readiness for their return. It cannot be said that the wife is not in occupation. She is entitled to the protection of the Acts.

I therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co., for Pattinson, Harrison and Milne, Macclesfield; Burton, Yeates and Hart, for Barclay, May & Co., Macclesfield.*

C. G. M.

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Feb. 2, 3, 6, 7

Bucknill
Singleton and
Denning L.JJ.

Landlord and tenant—Long lease with full repairing covenants—Premises requisitioned two and a half years before end of lease—Lease assigned two years before end of lease—Liability of assignee on repairing covenants—Requisition still continuing—Diminution in value of the reversion—Assessment—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

The assignee of a long lease of premises, containing full covenants to repair, which was assigned to him two years before the date of the termination of the lease, when the premises were already requisitioned, was sued by his landlord on the termination of the lease for breaches of the covenants to repair. The premises at the date of the termination of the lease were still requisitioned, and the date of the termination of the requisition was undetermined. It was contended for the defendant that, although, following *Joyner* v. *Weeks* [1891] 2 Q. B. 31, before March 25, 1928, the damages would have been assessed as at the end of the lease, the effect of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, was that they must be assessed by reference to the time when the possession of the premises actually reverted into the possession of the landlord; that accordingly the court must look into the future to see what the condition of the premises then might be; and that the requisitioning authority still might make good some or all of the dilapidations. It was also contended that there would be no damage to the landlord from any want of decorative repair during the period of the requisition, since the landlord could not benefit from the doing of decorative repair or suffer by its omission: he could not benefit from the doing of the decorative repair because, by the time the requisition was terminated, the benefit of it to the premises would have worn off; and he could not suffer from its omission, because, by virtue of s. 10 of the Requisitioned Land and War Works Act, 1948, he received compensation for all dilapidations which befell during the period of requisitioning. Accordingly, by reason of either argument, the damages in the action could not be more than nominal.

Held, that (1.) The damages must be assessed not by reference to the time when the land reverted into the possession of the landlord at the termination of the requisition, but as at the date of the termination of the lease, although the defendant, the assignee of the lease, could never have had the right to go into possession to do the repairs: see *Matthey* v. *Curling* [1922] 2 A. C. 180.

(2.) The proper measure of damages was the difference in the value of the reversion at the termination of the lease, between the premises in their then state of disrepair and in the state in which they would have been if the covenants had been fulfilled. The question, therefore, here was: how much was the market value of the landlord's interest diminished at the end of the lease by reason of the disrepair for which the then assignee was responsible? *Hanson* v. *Newman* [1934] Ch. 298 followed.

(3.) The defendant was responsible in point of law for seeing that the premises were kept in a good state of repair right up to the end of the lease, but this was subject to the qualification that by s. 1 of the Landlord and Tenant (Requisitioned Land) Act, 1944, the assignee was not liable for damage occurring to the land during the period of requisition; but he was liable for the previous want of repair in so far as it still continued during the time of the requisition.

(4.) In so far as alterations were made by the requisitioning authority before the termination of the lease which would have rendered any of the covenanted repairs valueless, the assignee was not responsible; and in so far as the authority before the end of the lease made good any previous want of repair the assignee should be given the benefit of this work just as he would be if the work had been done by a sub-tenant.

(5.) Future events, after the termination of the lease, could not in themselves reduce or extinguish the damages, but they might be taken into account in so far they threw light on the value of the reversion as at the date of the end of the lease.

(6.) In cases where it was plain that the repairs were not going to be done by the landlord, the cost of them was little or no guide to the diminution in value of the reversion, which might be nominal. But where the repairs had been or were going to be done by the landlord, the cost might be a very real guide to that value. Where it was open to question whether the repairs would be done by the landlord, the cost might afford a starting figure, but it should be scaled down, according to the circumstances, remembering that the real question was: what was the injury to the reversion? *Espir* v. *Basil Street Hotel Ld.* [1936] 3 All E. R. 91; *James* v. *Hutton* [1950] 1 K. B. 9; and *Jones* v. *Herxheimer*; ante, p. 106, followed.

APPEAL from Lynskey J.

The plaintiff, David de Crespigny Smiley, was the freeholder of No. 31 Montpelier Square, Knightsbridge, let on a ninety-eight years' lease at a ground rent of 10*l.* 10*s.*, expiring on June 24, 1947. On May 11, 1945, the defendant, John Somerville Townshend, took an assignment of the lease, the premises having been requisitioned on December 20, 1944, by Westminster Corporation to house the homeless, when the premises were occupied by two or three families. The premises were, at the time of the requisition, somewhat out of repair, but not badly so; and the plaintiff's valuer made out a schedule of dilapidations. The council made considerable alterations to the premises and did a certain amount of repairs to make them suitable for occupation. The premises were still under requisition at the date of the trial. At the expiration of the lease the defendant's valuer examined the 1944 schedule of dilapidations, and the two valuers agreed that, subject to any question under the Landlord and Tenant Act, 1927, the liability in respect of repairs under the covenants in the lease was 585*l.* The plaintiff sued the defendant for breach of the covenants of the lease. The plaintiff's valuer, in evidence, said that the diminution in the value of the reversion through lack of repair, with the property requisitioned, was 750*l.* The defendant's valuer said that, in assessing the amount of 585*l.*, he thought that was the correct method of assessing the defendants' liability as in October, 1947, soon after the expiration of the lease. Later, in answer to the judge, he said that approximately his view was that, taking into account any reduction that might be caused by what the council had to pay, that would affect the selling price of the reversion to a like amount. There was, therefore, evidence of diminution in value of the reversion given by the surveyors for both parties. Since the termination of the lease, the requisitionings authority had done the outside painting of the premises.

Lynskey J. found that before the termination of the lease work had been done by the requisitioning authority to make good some of the repairs which ought to have been made good by the defendant, his predecessor in title or both. He assessed this item at 150*l.* The defendant had already paid something on account of structural repairs which were necessary. Deducting both these sums from 585*l.*, he gave judgment for the plaintiff for 290*l.*

The defendant appealed.

Shelley K.C. and *L. A. Blundell* for the defendant. The assessment by Lynskey J. of 290*l.* damages in this suit at the termination of the lease for breach of the covenants to repair raises two questions under s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927. The sub-section puts a limit on the amount of damages which can be recovered in such an action. The damages " shall in no case exceed the amount (if any) " by which the value of the reversion (whether immediate or " not) in the premises is diminished owing to the breach of " such covenant . . . . " What is meant by the words in the section " the reversion " ? First, it is submitted that they mean the estate of the landlord which begins with his right to obtain possession of the land. Secondly, if that is not the meaning, the effective damage to the reversion can only be assessed with regard to that period of his reversion which begins with his right to possession of the land. Did the trial judge apply the correct principle in his assessment of these damages, and was there evidence in support of his findings?

The words in parenthesis in the sub-section "whether "immediate or not" mean "whether the reversioner takes "possession or not." Where the breach sued on is to keep or put in repair during the term the damage is to a reversion which is not immediate. The second case is where the landlord has granted a reversionary lease. The reversion must mean the estate of the landlord which begins with his right to possession of the land. In this case, no one knows when that will be. These premises are still requisitioned and the period of the requisition is still undetermined. By s. 1 of the Landlord and Tenant (Requisitioned Land) Act, 1944, the defendant is not liable for damage occurring to the land during the period of the requisition. As to any disrepair there may have been to the premises at the time when the land was requisitioned and which continued, no one knows and no one can know to what extent that disrepair will be remedied by the requisitioning authority. In fact, since the termination of the lease, the authority has done the outside painting of these premises. It follows that in any event the damage must be merely nominal. Since the Landlord and Tenant Act, 1927, came into force, by virtue of s. 18, sub-s. 1, the rule applicable in this case as to damages is not the artificial rule laid down in *Joyner* v. *Weeks* (1), but rather that of *Hadley* v. *Baxendale* (2). There was no evidence here of damage to the reversion.

The word "reversion" is used in two senses, as appears from the close of the judgment of P. O. Lawrence L.J. in *Hanson* v. *Newman* (3): One of them is "the freehold or "leasehold estate of the landlord subject to the lease or "sub-lease." The other is the sense which has already been suggested: see *Conquest* v. *Ebbetts* (4) and *In re Moore & Hulm's Contract* (5). It is submitted that *Terroni & Necchi* v. *Corsini* (6) was wrongly decided. Maugham J. in that case misapplied the decision in *Joyner* v. *Weeks* (1): see the decision

(1) [1891] 2 Q. B. 31.
(2) (1854) 9 Exch. 341.
(3) [1934] Ch. 298, 306.
(4) [1895] 2 Ch. 377; [1896] A. C. 490.
(5) [1912] 2 Ch. 105.
(6) [1931] 1 Ch. 515.

of the Court of Appeal in that case. See also the judgment of Greene M.R. in *Salisbury* (*Marquess*) v. *Gilmore* (1) and of MacKinnon L.J. in that case (2).

Blundell following. There could have been no damage to the landlord from any want of decorative repair during the time when the defendant, as assignee, held the lease, because the plaintiff, the landlord, could not benefit from the doing of decorative repair or suffer by its omission. He could not benefit, because by the time that the requisition came to an end, whenever that might be, the benefit of the decorative repair would have worn off. Indeed, the landlord's surveyor admitted that the value of the decorative work would be exhausted in the course of a long requisition: the value would have disappeared. The landlord would not suffer, whether the defendant did the repair or whether he did not, because under s. 10 of the Requisitioned Land and War Works Act, 1948, he got compensation for all dilapidations during the requisition. The court has to look at the actual circumstances of the case to see if there is any real damage to the reversion. In *Landeau* v. *Marchbank* (3) Lynskey J. laid down that lack of repair was not even prima facie evidence of damage to the value of the reversion. The Court of Appeal in *Jones* v. *Herxheimer* (4) established that that sweeping proposition went too far.

Phillimore for the plaintiff. It is well established that damages for breach of a covenant to deliver up in repair must be assessed as at the date of the termination of the lease. The theory advanced by the defendants that this sum cannot be assessed without full knowledge of what will or may occur in the premises in the future, or until future events have occurred, is directly contrary to the authorities and will make chaos in the relations of landlord and tenant.

In May, 1945, when the premises were assigned to the defendant, he became responsible for any continuing breach of the covenants to repair: he was under covenant to keep in repair. The premises then being out of repair, he was bound to put them in repair and to keep them so: *Plummer* v. *Johnson* (5). Between the date of the requisition and June, 1947, when the lease terminated, the requisitioning authority had effected both alterations and repairs. That factor had

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(1) [1942] 2 K. B. 38, 47.
(2) Ibid. 48.
(3) [1949] 2 All E. R. 172.
(4) Ante p. 106.
(5) (1902) 18 T. L. R. 316.

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been disregarded by the surveyors, and the trial judge had assessed the value of these alterations and repairs at 150*l.* At the termination of the lease, the two surveyors had agreed that, subject to any question under the Landlord and Tenant Act, 1927, the liability in respect of repairs under the covenants in the lease was 585*l.* There was evidence before the judge which was not challenged that this (less the 150*l.*) was the damage to the reversion as at the termination of the lease. At the date of the derequisition, when that occurs, by virtue of s. 10 of the Requisitioned Land and War Works Act, 1948, the requisitioning authority would pay to the landlord, the plaintiff, the difference between the value of the premises as at the date of requisition and as at the date of derequisition.

Lynskey J. decided that he must award the plaintiff damages for the state of the premises as at June, 1947, when the lease terminated. Deducting the 150*l.* and a further sum for what the defendant had already paid for structural repairs, he found for the plaintiff for 290*l.* By this decision he followed *Hanson* v. *Newman* (1), considering the diminution in value of the reversion—the landlord's then interest in the premises—at the end of the lease. He had to decide by how much was the market value of the landlord's interest diminished at the end of the lease by reason of the disrepair for which the defendant, the assignee, was responsible. And this he did taking the only practical test—that laid down in *Hanson's* case (1). The mere fact that, at the termination of the lease, the premises continued to be requisitioned cannot affect the value of the reversion as at the termination of the lease. In *Terroni and Necchi* v. *Corsini* (2) the decision of Maugham J. was clearly right, even if his reference to *Joyner* v. *Weeks* (3) was unfortunate. It is clear that the point of time which has to be considered under s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, is the termination of the lease: see *Salisbury (Marquess)* v. *Gilmore* (4).

Covenants to repair run with the land. The fact that the premises were out of repair when the lease was assigned to the defendant affords him no defence, and every day after the assignment there was a continuing breach, although, by reason of the requisition, the defendant could not go upon the premises to repair them: *Matthey* v. *Curling* (5). In default of recovering damages against the original tenant, the plaintiff, if the arguments for the defendants are sound, can never recover for these breaches of covenant to repair.

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(1) [1934] Ch. 298.
(2) [1931] 1 Ch. 515.
(3) [1891] 2 Q. B. 31.
(4) [1942] 2 K. B. 38, 47.
(5) [1922] 2 A. C. 180.

Shelley K.C. replied.

BUCKNILL L.J. :—I will ask Denning L.J. to give the first judgment.

DENNING L.J. This case raises interesting questions as to the proper measure of damages for breach of covenant to repair when at the material time the premises were under requisition. In May, 1945, during the requisition, the defendant took an assignment of the lease, which then had little more than two years to run. He received the compensation rent from the Westminster Corporation, but, of course, did no repairs himself. Now he is sued by the landlord for breach of the repairing covenants at the end of the lease, and the question is: what is his responsibility?

Let me say at once that, if the landlord had sued the previous lessee who had held the lease in December, 1944, when the premises were originally requisitioned, there is no doubt that, as against that man, the landlord could have recovered considerable damages for breach of the covenant to keep in repair during the term, because his reversion was injured by reason of the dilapidations which existed in December, 1944. The presence of those dilapidations would mean that the requisitioning authority would pay a lower compensation rent, and that would, of course, affect the landlord after the lease fell in. They would also affect the compensation payable to the landlord when the council gave up the premises, because less compensation would be paid at the end of the requisitioning if the premises were already dilapidated at the beginning.

The question is, however, not the responsibility of the previous lessee, but what is the responsibility of this assignee, who only took his assignment in May, 1945, after the premises had been requisitioned. He had no right to go into possession to do any repairs, even if he had wished to do them, and it might at one time have been said that, as it was impossible for him to do the repairs, he ought not to be liable at all; but ever since the decision in *Matthey* v. *Curling* (1) it has been settled that the fact of requisitioning is no answer to a tenant who is sued for breach of repairing covenants. He is just as

(1) [1922] 2 A. C. 180.

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responsible for the time during which the premises were requisitioned as he would have been if the premises had been sub-let. If the premises had been sub-let and he had not been able to go in, he would still in law be responsible.

So, also, if the premises have been requisitioned, an assignee is responsible in law for seeing that the covenants are complied with during his time. Breaches of covenant to repair are continuing breaches, and, if they continue in the time of the assignee, he becomes responsible for them. A covenant to keep in repair imports a covenant to put in repair if repair is necessary. There is no doubt, therefore, that the defendant was responsible in point of law for seeing that the premises were kept in a good state of repair right up to the end of the lease in 1947, even though they were requisitioned.

This is, however, subject to the qualification introduced by s. 1 of the Landlord and Tenant (Requisitioned Land) Act, 1944, by which the tenant is not liable for damage occurring to the land during the period of requisition. The defendant is not liable, therefore, for damage done during the time when Westminster Corporation were in; but he is liable for the previous want of repair in so far as it still continued during his time. If and in so far as structural alterations, or, I may add, other alterations, were made by the corporation before June 24, 1947, which would have rendered any of the covenanted repairs valueless, the defendant is not responsible, because that is damage done by them for which he is not liable; and, if and in so far as the corporation before June 24, 1947, made good any of the previous want of repairs, he has the benefit of their work just as he would have the benefit of any repairs done by a sub-tenant. But if and in so far as the premises remained unaltered and unrepaired—as to some extent they seem to have done—then he remained responsible right up to the end of the lease.

The question is what is the proper measure of damages for that breach? It was strongly urged before us that the damages should be nominal. Mr. Shelley put his argument in this way: he said that before March 25, 1928, the damages would have had to be assessed as at the end of the lease: see *Joyner* v. *Weeks* (1); but that the effect of the Landlord and Tenant Act, 1927, is that they must be assessed by reference to the time when the land actually reverts in possession to the landlord; and that, if that time has not yet arrived, as it has

(1) [1891] 2 Q. B. 31.

not done here, the court must look into the future to see what the condition of the premises will be. It may be in this case that the corporation will make good all the dilapidations. Mr. Shelley points out that they have already done the outside painting. They may do more. They may do all. If they do so, the landlord will get his premises back fully repaired, so why should he get damages as well ? He cannot, therefore, show that he will suffer any damage.

Mr. Blundell, also for the defendant, put the argument rather differently. He said that there could be no damage to the landlord from any want of decorative repair during the time of this assignee, because the landlord could not benefit from the doing of decorative repairs, or suffer by the omission of them. On the one hand, the landlord would not benefit, for, if the defendant had in fact done all the decorative repairs during his time (that is in 1945, 1946 or 1947), the landlord would not have benefited at all, because, by the time the requisition comes to an end, whenever that may be, the benefit of them would have worn off. Indeed, the plaintiff's valuer, in the course of what, if I may say so, was a very skilful cross-examination by Mr. Blundell, admitted that the value of the decorative work would have been exhausted in the course of a long requisition and the value would have quite worn off.

On the other hand, the landlord would not suffer whether the defendant did the decorative repairs or not, because under s. 10 of the Requisitioned Land and War Works Act, 1948, he gets compensation for all dilapidations during the requisitioning. The landlord's compensation would, therefore, not be lessened one penny whether the defendant had done the decorative repairs in 1947 or not. I appreciate the force of both these arguments ; and, if the correct measure of damage were such a sum as represents the damage which the landlord will sustain when he gets the premises back, they would have great weight. But the answer to them both is that the damages must be assessed not by reference to the time when the land reverts in possession, but as at the end of the lease. I take it from authorities which this court is not at liberty to disregard that the proper measure of damage is the difference in value of the reversion at the end of the lease between the premises in their then state of unrepair and in the state in which they would have been if the covenants had been fulfilled. That test was laid down by this court in *Hanson* v. *Newman* (1).

(1) [1934] Ch. 298.

What has to be considered is the diminution in value of the reversion at the end of the lease; and I take the word "reversion" to mean the landlord's then interest in the premises. If he is the owner and the premises are requisitioned, then the reversion is his freehold, subject to the existing requisition, because that is the landlord's then interest in the premises. The question is, therefore: how much was the market value of the landlord's interest diminished at the end of the lease by reason of the disrepair for which the then assignee was responsible?

Any other view would give rise to great difficulty. For instance, if the future cost of repair to the landlord were the measure, the court would be asked to deduct the estimated amount of repairs which will be done by the corporation after the lease comes to an end. But the court cannot speculate as to what repairs may be done by the corporation during the period of requisition. It is entirely a matter of speculation how long the requisition will last and whether the local authority is going to do any more repairs; and in that situation the words of Lord Herschell in *Conquest* v. *Ebbetts* (1) are in point. He said "I do not think the court would do right, in "assessing the damages in the present case, to involve itself "in the instance of the appellants in considerations of that "character . . . . They have broken their covenant, and, "when sued for the breach, they have, in my opinion no right "to demand that a speculative inquiry shall be entered upon "as to what may possibly happen and what arrangements "may possibly be come to, under the special circumstances "of the case . . . ."

It has indeed turned out that since the lease came to an end the corporation have during the requisition done the outside painting; so that to that extent it is not a matter of speculation; but, even so, it does not alter the position, for, if the landlord is lucky enough to have some repairs done later by the local authority (or it may be in other cases by a fresh tenant under a reversionary lease: see *Terroni and Necchi* v. *Corsini* (2)), that does not of itself effect the measure of damages as against an assignee who has broken his covenant: it is res inter alios acta. It is like the cases of the sale of goods where it has been held that a buyer of goods which are not up to contract is entitled to recover damages for the inferiority in quality even though he has made a profitable re-sale and has suffered in fact no damage: see *Slater* v *Hoyle & Smith, Ld.* (1).

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(1) [1896] A. C. 490, 495.

(2) [1931] 1 Ch. 515.

In the course of the argument, Bucknill L.J. gave another illustration. If a man's motor-car is damaged by negligence and is out of repair, is the wrongdoer exempted because at some later date the car is destroyed by fire? The answer is clearly, No. And we are all familiar with the rule that insurance money does not go in reduction of damages: see *Bradburn* v. *Great Western Ry. Co.* (2). There are, therefore, many cases in which a thing that happens after a breach of contract or after a wrong done cannot be prayed in aid by the man who breaks his contract or by the tortfeasor in diminution of damages, because it is res inter alios acta.

It does not follow, however, from all this that, when you come to apply the proper measure of damage—injury to the reversion—future events and probabilities are to be disregarded: they may have an important bearing on the value of the reversion at the end of the lease. Section 18 of the Landlord and Tenant Act, 1927, itself shows that future events are to be regarded; for, if the premises are to be pulled down at or shortly after the end of the lease, so that any repairs would have been valueless, that is a ground for depriving the landlord of any damages at all. But in such cases the subsequent event, when it happens, is not in itself sufficient to extinguish the damages. It is only evidence, albeit strong evidence, in retrospect, of the future as it appeared at the end of the lease. In *Salisbury (Marquess)* v. *Gilmore* (3) it was shown that the Marquess of Salisbury had the intention at the end of the lease of pulling down the premises; but a few days later he changed his mind and determined not to pull down the premises. The court said that the material time was at the end of the lease, and, if at the time of the end of the lease he had the intention to pull down the premises, it did not matter that he changed his mind afterwards. The true view is, therefore, that matters happening subsequently to the end of the lease do not of themselves affect the damages. The only effect of subsequent demolition is that it shows, in retrospect, what was the future when the lease came to an end, and thus throws strong light on the injury to the reversion at that time.

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(1) [1920] 2 K. B. 11.
(2) (1874) L. R. 10 Ex. 1.
(3) [1942] 2 K. B. 38.

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Mr. Shelley took another instance which is not within the last half of s. 18, sub-s. 1; he took the example of a house let on a long lease which was, by reason of its large size and great number of rooms, not suitable for occupation as a dwelling-house at the present day, but only for use as a warehouse for which decorative repairs would be valueless. If the decorations were not in fact done, he said, the court would take that fact into account, even though it did not fall within s. 18. I agree that the court would do so, but the reason would be because in such a case the damage to the reversion would be nil. At the end of the lease the premises would be of as much value as a warehouse as a highly decorated dwelling-house. These illustrations show that, although future events do not in themselves reduce or extinguish the damages, nevertheless they may properly be regarded in so far as they throw light on the value of the reversion at the end of the lease.

In my opinion, therefore, the judge directed himself quite properly. He asked himself what was the lack of repair at the end of the lease for which the defendant was responsible, and he inquired by what amount at that time was the value of the existing reversion, subject to the requisition, reduced by reason of that lack of repair. That was the proper test.

It is, however, said that, even so, the judge did his calculation wrongly. He founded himself on the schedule of repairs as at December 20, 1944, and the cost of making good that schedule. He then made allowances for repairs done by the corporation before June 24, 1947, and thus arrived at his figure. It is said that he was wrong in basing himself on the cost of repairs.

In cases where it is plain that the repairs are not going to be done by the landlord, the cost of them is little or no guide to the diminution in value of the reversion, which may be nominal: see *Espir* v. *Basil Street Hotel, Ld.* (1) and *James* v *Hutton* (2). But in cases where the repairs have been, or are going to be, done by the landlord, the cost may be a very real guide. That is shown by the recent case of *Jones* v. *Herxheimer* (3) to which we were referred. In cases where it is open to question whether the repairs will be done by the landlord, as in the present case, then the cost may afford a starting figure; but it should be scaled down according to the circumstances, remembering that the real question is: what is the injury to the reversion? That is what the judge did here, as I read his judgment: he used the cost merely as an aid in assessing the diminution in value of the reversion. I do not think that I should myself have given so much weight to the cost of repairs; or, at any rate, having regard to the requisition I should have scaled down the figure considerably just as damages for breach of covenant to keep in repair during the term are scaled down according to the length of time unexpired: see *Conquest* v. *Ebbetts* (1). But the fact that I would have given less is not a ground for interfering with the assessment made by the judge. He has directed himself properly on the measure of damages, and we cannot interfere merely on a question of quantum unless the figure is plainly wrong, which is not the case here. In my opinion, therefore, this appeal should be dismissed.

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(1) [1936] 3 All E. R. 91.

(2) [1950] 1 K. B. 9.

(3) Ante. p. 106.

SINGLETON L.J.: I agree that this appeal should be dismissed. I add a few words out of deference to the arguments which have been addressed to the court. The decision must depend on the interpretation of s. 18 of the Landlord and Tenant Act, 1927, which provides "Damages for a breach in sub-s. 1 "of a covenant or agreement to keep or put premises in repair ". . . . shall in no case exceed the amount (if any) by which "the value of the reversion (whether immediate or not) in the "premises is diminished owing to the breach of such covenant "or agreement as aforesaid." The attention of this court was directed also to s. 10 of the Requisitioned Land and War Works Act, 1948, the section which places a limit upon the amount of compensation payable by the requisitioning authority in respect of making good requisitioned land.

With regard to the interpretation of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, it seems to me that this court is bound by that which was said in *Hanson* v. *Newman* (2). In that case, Lawrence L.J., approving the words of Luxmoore J. in the court of first instance, said (3): "A reversion may "not be a reversion in possession (that is, it may not be "immediate) by reason of the freeholder having granted "a reversionary lease, and in that case the reversionary "lease is to be disregarded in assessing the damages.

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(1) [1895] 2 Ch. 377, 384; [1896] A. C. 490, 494.

(2) [1934] Ch. 298.

(3) Ibid. 305.

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"In my judgment, what the court has to do in assessing "damages under the section in the circumstances of "this case is to ascertain the actual value of the property at "the date of re-entry and the value which the property would "then have had if there had been no breach of covenant; and "the difference between these two values is the amount of "the damages sustained by the landlord (that is to say), "the difference between the value of the property as it stands "and the value which it would have had in case the tenant "had fulfilled his obligations under the covenants in the "lease."

Lynskey J., in this case, followed that test and he had before him evidence on which he could arrive at those values. The plaintiff called one surveyor or valuer, and so did the defendant. There was no complete schedule of dilapidations or of lack of repair as at the termination of the lease, which is the important time; but there was a schedule of dilapidations showing the condition of the house at the date of the requisition; that was checked by both surveyors soon after the termination of the lease; and it is upon that that they based their figures.

One argument on behalf of the defendant put forward by Mr. Blundell was of this nature: true, the defendant was under a liability to do repairs and those repairs were only partly done: prima facie, it is said, there is damage to the reversion; but it may be only nominal damage. He said that the only time that the defendant was able to do the repairs was after the property was requisitioned, because he was not assignee until after the requisition. The argument proceeded: if the defendant had done those repairs at that time, the landlord would not have benefited one penny in actual money. Therefore, Mr. Blundell submitted, the defendant could not be liable in this case for anything more than nominal damages. I still feel that the answer to that may depend on whether there was damage to the reversion in the years 1945, 1946 or 1947. Evidence was called upon that, and I should not have been surprised if some surveyor or surveyors had said: in view of the nature of the lack of the repair or of the breaches of covenant and in view of the fact that this property was requisitioned by Westminster Corporation, and that it has been altered to some extent, and in view of the fact that no one knows how long that requisition will last, the damage is small or nominal. That kind of evidence would not have surprised me in the slightest, for it must be extraordinarily difficult for anyone to say that lack of repair of that kind, particularly as to decoration, may substantially diminish the value of a reversion if that property is in fact requisitioned at the time and if no one can say how long the requisition will last. It seems to me, however, that the court must be guided by the evidence, unless there be some overriding consideration of law which compels the court to say, notwithstanding that evidence, that only nominal damages can be given because the damage to the reversion can only be nominal. Counsel on behalf of the defendant was really asking this court to do the work of witnesses. There was evidence on which Lynskey J. decided and, unless he misdirected himself, this court ought not to interfere; nor ought it to be asked to take the place of experienced valuers.

The plaintiff's valuer was responsible for the original schedule, and, after the expiration of the lease, the defendant instructed his valuer to go into that schedule from the point of view of his liability in respect of repairs. The two valuers agreed that, subject to any question under the Landlord and Tenant Act, 1927, the liability in respect of repairs under the covenant in the lease was the sum of 585*l*.

They were agreed that, at the expiration of the lease, the premises were not in the order in which they should have been, because of breaches of covenant. Then both of them, as I read the evidence, had to consider the question which arose under sub-s. 1 of s. 18 of the Act of 1927; and the plaintiff's valuer was asked: " As you know, the landlord is only entitled " to damages to the reversion ?—(A.) Yes. (Q). Can you help " his Lordship about that ? What do you say about the 585*l*., " as to whether that is damage to the reversion or not ?— " (A) I think the damage to the reversion in this particular case " might easily have been more."

The judge asked him about the diminution in value of the reversion with the property (*a*) requisitioned and (*b*) not subject to requisition. The witness said that the value of the property as requisitioned was 5,000*l*.; if it had not been requisitioned its value would have been 7,000*l*., subject to the question of lack of repair. He said that the diminution in the value through lack of repair was 750*l*., in his view, with the property requisitioned; and he put it as more if the property had been unrequisitioned. In either event, the plaintiff's valuer said, the damage to the reversion was greater than the sum of 585*l*. That is the position as I understand it.

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On the question of diminution in value, Mr. Shelley submitted that there was no evidence on which the court could decide it. There was, however, the evidence of the plaintiffs' valuer, who was not really cross-examined on that, though he was asked a question to show that, if the repairs had been done, the value of the repairs, particularly decorations, would have been exhausted before the date of de-requisition. He was not cross-examined to show that his estimate of value was wrong; nor was he asked on what it was based.

The defendant's expert witness did not deal in his examination-in-chief, as far as I can see, with the question of diminution in value; but Lynskey J. asked him what he had agreed with the plaintiff's valuer, and the witness answered: "It "really means that I thought that was the correct method "of assessing the defendant's liability in 1947." That was the figure of 585*l*. The judge asked: "you thought that was the "fair amount he ought to have paid, having regard to the "schedule of condition ?—(A.) Yes, I did at the time"; that is, October, 1947, soon after the expiration of the lease.

Then Mr. Phillimore resumed his cross-examination with a somewhat tentative question: "(Q.) And that that was "a fair amount which he ought to pay as being the damage "to the reversion ?—(A.) Yes." Mr. Phillimore did not ask him any further question on that, nor did Mr. Blundell in re-examination, but the judge said: "Tell me this from the "point of view of a surveyor. You were asked a question "which you answered; you said that you agreed with 585*l*., "the value of making good the dilapidations; you thought "that was a fair amount which he ought to pay as being "damage to the reversion. When you are considering what "amount you should be paid for dilapidations, do you take "into account the value of damage to the reversion, or not ?— "(A.) Yes. In this case I had thought, probably erroneously, "that the damage to the reversion was equal to the amount "by which the claim under s. 2, sub-s. 1 (*b*) of the 1939 Act "would be reduced by the dilapidations evidence in the 1945 "schedule. That is why I went ahead and agreed with "Mr. Ward, the value of the dilapidations in the 1945 schedule "provisionally at 585*l*." The judge then asked: "Does that "mean, in effect, that the price was the price of making good "the dilapidations shown in the schedule of condition, and that "your view was that, taking into account any reduction that "might be caused by what the council would have had to "pay, that would affect the selling price of the reversion to "a like amount. Is that approximately right, or not?— "(A.) Yes, approximately that was the view I took then." There was, therefore, evidence of diminution in value given by the surveyors on both sides.

Thus there was evidence on which the judge was asked to come to a conclusion. He has, as I think properly, said that before the termination of the lease some work had been done by the requisitioning authority to make good some of the repairs which ought to have been made good by the defendant or his predecessor in title, or both. He assessed the amount of the work so done at the sum of 150*l.* The defendant had already paid something on account of structural repairs which were necessary, and the judge deducted both those sums from the 585*l.* and gave judgment for the difference. I think that that was right.

It has been said that he ought to have taken into consideration work which was done by the requisitioning authority after the termination of the lease and before the date of the hearing, and that he always must bear in mind the fact that this property was requisitioned.

With regard to the first of those questions, I thought that at one time probably the defendant ought not to be asked to pay for the outside painting which was done by the requisitioning authority after the expiration of the lease but before the case was heard. That was only the sum of 39*l.*, and it may well be, if that outside painting ought to have been done long before it was done, that damage to the property had taken place, because the object of painting is to avoid damage to property. On the whole I do not think it right to say that anything should be done with regard to that one item, particularly as it has not been raised as an individual item by the defendant's counsel. As to the other matter, namely, that the judge ought to bear in mind that this property was requisitioned, I agree that he should. I think that he did. The evidence of the valuer was based upon that, and it is upon that evidence that the judge gave judgment.

This case was heard on October 26 and 27, 1949. It is not without interest to note that one of the authorities to which we were referred this morning, that of *Landeau* v. *Marchbank* (1), was before the same judge in June of 1948, and his judgment was given in May, 1949, only a few months before

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(1) [1949] 2 All E. R. 172.

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Singleton L.J.

this case was heard. In that case the judge decided that, although there was evidence of lack of repair, in the circumstances of the case the plaintiff had not proved diminution in the value of the reversion, and so he gave judgment for only nominal damages.

In the course of his judgment in *Landeau* v. *Marchbank* (1) the judge appears to have said (2): "It seems to me that, "having regard to those decisions, the fact that repairs are "necessary is not in itself even prima facie evidence of damage "to the value of the reversion. In certain circumstances, it "may be an important factor, but of itself the fact that a "certain amount of repair needs to be done does not, in my "view, necessarily mean that there is damage to the reversion." If I may respectfully say so, I agree with the judgment in that case except that I would substitute the word "conclusive" for the words "even prima facie." Evidence of lack of repair is not conclusive evidence of damage to the value of the reversion; but it may well be, and is generally held to be, prima facie evidence of it.

In *Landeau* v. *Marchbank* (1) the judge decided that there was no evidence of diminution in value of the reversion; but in the present case he had before him evidence on both sides that there was diminution in value of the reversion. That being so, it was for him to say, upon that evidence, how much it was. I agree that the appeal should be dismissed.

BUCKNILL L.J.: I agree.

Appeal dismissed.

Solicitors: *Woodham Smith, Borradaile and Martin; Withers & Co.*

(1) [1949] 2 All E. R. 172. (2) Ibid. 175.

C. G. M.

Applied. PERRY *v.* DEMBOWSKI. [1951] 2 All E.R. 50.

Applied. LANGDON *v.* HORTON [1951] 1 K. B. 666

GAMMANS *v.* EKINS.

Referred to. PERRY *v.* DEMBOWSKI [1951] 2 K. B. 420

[Plaint No. F. 3021.]

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1950
May 15.
Evershed M.R., Asquith and Jenkins L.JJ.

Landlord and tenant—Rent restriction—Tenant living in unmarried association with man at her death—Man not member of "tenants' "family"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (11 *&* 12 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).

The tenant of premises within the Rent Restriction Acts had for a number of years been living in an unmarried association with a man, the defendant, who had taken her name. They were regarded in the neighbourhood as man and wife. On the death of the tenant the defendant claimed, by way of defence to the landlord's action for possession, to be a member of her " family " within the meaning of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and thus entitled to the protection of the Rent Restriction Acts.

Held, that a person in the position of the defendant could not be held to be a member of the tenant's " family " within the meaning of the sub-section, and that accordingly the landlord was entitled to possession.

Quaere, whether if two unmarried persons are living together and there are children of that union, on the death of the one who is a tenant of controlled premises the survivor can claim to be a member of the tenant's " family " within s. 12, sub-s. 1(*g*).

Brock v. *Wollams* [1949] 2 K. B. 388, considered.

APPEAL from Portsmouth county court.

The plaintiff, David Gammans, the owner of No. 177, Avery Lane, Gosport, a house within the Rent Restriction Acts, let it to a Mrs. Smith who lived there until her death in 1949. The defendant, J. J. Ekins, had lived with her for a number of years, and had taken her name. In the neighbourhood they were thought to be man and wife.

On the tenant's death the defendant refused to quit the premises claiming to be a member of the tenant's " family " within the meaning of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1). The landlord in these proceedings claimed possession on the ground that the defendant was a trespasser.

The county court judge gave judgment for the defendant, finding him to be a member of the tenant's family. The landlord appealed.

L. A. Blundell for the landlord. It is submitted that, wide as is the meaning which has been attributed to the word " family " in s. 12, sub-s. 1 (*g*) of the Act of 1920, the defendant is not a member of the late tenant's " family." The friendship between the late tenant and the defendant was platonic or it was not :

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 : " For the " purposes of this Act, except " where the context otherwise " requires . . . . (*g*) . . . . the " expression ' tenant ' includes the " widow of a tenant who was " residing with him at the time " of his death, or, where a tenant " leaves no widow or is a woman, " such member of the tenant's " family so residing as aforesaid " as may be decided in default " of agreement by the county " court."

the county court judge did not decide which. If it was platonic, then the defendant was not a member of the tenant's family. If it was a sexual relationship, the court will not condone it and confer any rights under the Rent Restriction Acts. The persons who have been held to be members of the tenant's "family," as the word is used in s. 12, sub-s. 1 (*g*), can be divided into three groups: first, blood relations; secondly, relations by legitimate marriage or relations through the tenant's wife or husband, and thirdly, all children, legitimate, illegitimate and adopted, whether formally or not. In short, all persons in relation to whom the tenant is in loco parentis. Where an unmarried man and woman have lived together and there are children of that association, it may be that the children could claim protection as being members of their parents' family. That is not this case.

Seymour Collins for the defendant. Where a man and woman have lived together for a long time they may build up a family life. The informality of their marriage should not preclude the creation of a "family." There may be a "family" where there are children of such a union although the parents are not married. An example of such a case is where the parties have gone through a ceremony of marriage which is void. The existence of a child is not a condition of a man's being a member of his wife's family: *Salter* v. *Lask* (1). In *Jones* v. *Trueman* (2) the county court judge held that a woman who had lived with a protected tenant was a member of his family. It is not necessary for a person to be a blood relation of a tenant to be a member of his family. This is the case of a man who has placed himself in the position of the tenant's husband where the outward appearance of a family has been created, the head of that family should be entitled to the protection of the Rent Restriction Acts.

He referred to *Price* v. *Gould* (3); *Brock* v. *Wollams* (4); *Jones* v. *Whitehill* (5).

L. A. Blundell in reply. The word "family" as ordinarily used in English does not extend to include the defendant. The fact that a man and woman deceive their neighbours and are thought to be man and wife should not give them additional rights under the Rent Restriction Acts.

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(1) [1925] 1 K. B. 584.

(2) Not reported, but see Current Law Year Book, 1949, Section 3385.

(3) (1930) 46 T. L. R. 411.

(4) [1949] 2 K. B. 388.

(5) Ante p. 209.

ASQUITH L.J. [after stating the facts]. It has been held that "family" in s. 12, sub-s. 1 (*g*) of the Act of 1920 should be given its popular meaning: See *Brock v. Woollams* (1). Consanguinity is not a prerequisite of membership of the same family. On the authorities, not only are children members of their parents' family, but a husband is a member of his wife's, an adopted child a member of the adopter parents', and a husband, on unusual facts, has been held to be a member of the same family as his wife's niece. Mr. Blundell, I think, was right in saying that the material decisions limit membership of the same "family" to three relationships: first, that of children; secondly, those constituted by way of legitimate marriage, like that between a husband and wife; and thirdly, relationships whereby one person becomes in loco parentis to another. Beyond that point the law has not gone. I do not think that we should be justified in saying that the defendant was a member of the tenant's family. Either the relationship was platonic or it was not. The judge has not found which, and says that it makes no difference; but if their relations were platonic, I can see no principle on which it could be said that these two were members of the same family, which would not require the court to predicate the same of two old cronies of the same sex innocently sharing a flat.

If, on the other hand, the relationship involves sexual relations, it seems to me anomalous that a person can acquire a "status of irremovability" by living or having lived in sin, even if the liaison has not been a mere casual encounter but protracted in time and conclusive in character.

But I would decide the case on a simpler view. To say of two people masquerading, as these two were, as husband and wife (there being no children to complicate the picture) that they were members of the same family, seems to be an abuse of the English language, and I would accordingly allow the appeal.

JENKINS L.J.: I agree. If the matter were free from authority, speaking for myself I would have little hesitation in holding that the defendant was not a member of the tenant's family within any ordinary accepted use of that expression or within the meaning of s. 12, sub-s. 1 (*g*). There has, however, been a series of decisions, each of them addressed to the particular facts of the case before the court, which taken together have so extended the meaning of the word "family" for the purposes of the sub-section as to make it possible to argue with a considerable degree of plausibility that there is no reason why the benefit of the sub-section should not be extended also to the defendant. But when the cases are examined, it will, I think, be found that none of them goes so far as we are invited to go in the present case. The defendant was not in my view a member of the tenant's family in any reasonable sense whatever. The parties for reasons of convenience, had chosen to live together and the defendant, to avoid as he said gossip, had taken the tenant's name of Smith. The neighbours assumed that they were husband and wife and accepted them as such. I cannot regard this as giving the defendant the same claim to be considered a member of the tenant's family as if they had been lawfully man and wife.

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(1) [1949] 2 K. B. 388.

The point has been taken that if it be right that an adopted child may be a member of a statutory tenant's family, or that even an illegitimate child may be such a member, it would be illogical to exclude a reputed husband, or, in other words, a man living with a woman as his wife without having gone through a legal ceremony of marriage. I do not agree: it seems to me that, as soon as children of two such parties, or one of them, come into question, there may be said to be de facto an actual family, consisting of children and the natural parent or parents of those children. It is then, I think, easy to see how the children could properly be brought within the expression "family" according to the ordinary and popular meaning of the word. It is possible, but it is a matter for decision when it arises, that in such a case either of the de facto parents could properly be held to be a member of the other's family, because, although there is no legal tie in such a case, nevertheless, it might be said that the so-called husband was a member of the so-called wife's family as being the father of her children, and vice versa. The situation assumed would present de facto what might be described as the equivalent of a marriage, with the natural consequences of a marriage. Cases of that kind, it seems to me, must provide far stronger ground for the view that the man or woman, as the case may be, should be considered as a member of the woman's or the man's family, than a case where there is no more than a liaison between two elderly people who choose to pose as a married couple when they in fact are not. In my judgment that would be extending this section beyond all reason, and I am not disposed to allow such an extension. If the county court judge's decision were to stand, an alarming vista would, it seems to me, be opened up: if, for instance, brothers and sisters are members of the tenant's family, I see no reason why two friends should not set up house together, one changing his or her name to that of the other, and then give out that they were sisters or brothers or brother and sister as the case might be; in which case, provided that they were accepted as such in the neighbourhood, there would, by parity of reasoning, be no ground why, when one of them, being a statutory tenant of the house in which they both resided died, the other should not claim to be a member of the statutory tenant's family on account of the artificial relationship which they had chosen for their own purposes to adopt. I agree that the appeal should be allowed.

EVERSHED M.R. At first the problem presented by this appeal seemed to me not very difficult for, applying the test laid down by Cohen L.J. in *Brock* v. *Wollams* (1) namely, whether an ordinary man, addressing his mind to the question whether the defendant was a member of the tenant's family would answer it yes or no, it appeared that the answer must be no; and it was indeed difficult to imagine any context in which, by the proper use of the English language, a man living in such a relationship with her could be described as of the tenant's family. But the language of the Act is peculiar in this, that the husband of a female tenant must, I think, be intended to be covered by the word "family." In the case of a childless marriage, I should certainly not have thought it natural to refer to the husband as a member of the wife's family. But, as my brethren have indicated, the decisions under this paragraph have made it clear that the word "family" is certainly not confined to children born in wedlock. Mr. Blundell's contention that there is a distinction in favour of persons to whom the tenant stood in loco parentis may or may not be right, though I wonder whether it is exhaustive. If, however, children who are not born in wedlock, whether illegitimate children or adopted, are covered by the word "family," the question arises whether the word can also extend to a consort, even though that consort is not joined in matrimony to the tenant. Mr. Collins did not suggest that, where a man and woman had lived more or less casually together, the intention of Parliament could have been to give protection to the survivor of the two of them. But in this case, as he

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(1) [1949] 2 K. B. 388, 395.

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emphasized, the two persons had lived as man and wife for some considerable time, and had been accepted by the neighbourhood as such. In those circumstances, he said, there is no ground for expecting the section to exclude the defendant, or any ground of public policy compelling the court to do so.

I think, for my part that there is considerable force in this argument, and I have felt greater difficulty than my brethren in arriving at an answer. But, on the whole, I have come to the conclusion that the right test is that which I formulated at the beginning of my judgment and which has commended itself to my brethren, namely, to ask whether in the ordinary use of language, in answer to the question posed by Cohen L.J. in *Brock* v. *Wollams* (1), the defendant had been a member of the family of the late tenant. As it seems to me, the answer remains in the negative, after allowing for all the very forcible arguments which have been put on the other side. In *Jones* v. *Trueman* (2), the position was the other way round: there a man and woman had lived together as man and wife and they had had children: but they were never married. According to the very brief report, the county court judge came to the conclusion that as the man had been the tenant, the woman was entitled to the protection of the Act as being a member of his family; or, if he were wrong in that, that one or other of the children was entitled to that protection. It is unnecessary to say whether that decision was right or not; but certainly where there have been children of such a union the considerations may not be the same as are applicable in the case of a childless union. In this case, as Asquith L.J. observed, we are not beset by any complication of that character. It may not be a bad thing that by this decision it is shown that, in the Christian society in which we live, one, at any rate, of the privileges which may be derived from marriage is not equally enjoyed by those who are living together as man and wife but who are not married.

Appeal allowed.

Solicitors: *Bower, Cotton & Bower for H. Morgan Gammans, Portsmouth; Kingsford, Dorman & Co. for Blake, Lapthorn, Roberts & Rea, Portsmouth.*

(1) [1949] 2 K. B. 388, 395.

(2) Not reported, but see Current Year Law Book, 1949, Section, 3385.

B. A. B.

Considered. Burns v. Joseph Terry & Sons Ld. [1951] 1 K. B. 454

SMITHWICK *v.* THE NATIONAL COAL BOARD.

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1950
Apl. 18, 19, 20.

Tucker, Somervell and Denning L.JJ.

Mines—Coal mine—Machinery used in or about mine—"Exposed and "dangerous parts"—Duty to keep securely fenced—Parts exposed and dangerous—Test to be applied—"Foreseeability"—Evidence—Lack of fencing cause of workman's death—Burden of proof—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 55.

The test to be applied on the issue of what is a dangerous part of machinery within the meaning of s. 55 of the Coal Mines Act, 1911, which requires exposed and dangerous parts of machinery used in or about a mine to be kept securely fenced, is that the occupier must guard against all conduct which he can reasonably foresee. This test is thus conveniently and accurately summarized in Redgrave's Factories, Truck and Shop Acts (17th ed.), at p. 33: "The behaviour of human beings that has to be regarded is "such behaviour as is reasonably foreseeable, which is not necessarily "confined to such behaviour as is reasonable behaviour." An employer has to contemplate acts of carelessness and acts of negligence, but he has not to fence what would otherwise be a dangerous part of the machinery, but which is really inaccessible and to which no ordinary reasonable workman would be expected to go anywhere near or to come into contact with in any way.

Judgment of du Parcq J. in *Walker* v. *Bletchley Flettons Ld.* [1937] 1 All E. R. 175, as explained and amplified by him in *Stimpson* v. *Standard Telephones and Cables Ld.* [1940] 1 K. B. at pp. 359–60 followed.

Per Denning L.J. This test is the same substantially as that to be applied in considering whether a part of any machinery is "dangerous" within the meaning of Part II. of the Factories Act, 1937. The part of the machinery is "dangerous," if it is such that it may reasonably be foreseen to be a source of injury to people who may be in the vicinity, taking them with all the ordinary infirmities to which human nature is prone. The occupier must realize that not everybody is careful; many are hasty, careless or inadvertent; some are unreasonable, or even disobedient. It may be unlikely that they will act in such a way, but it is not only the likely, but also the unlikely, accident against which the occupier must guard. He must guard against all conduct which he might reasonably foresee. The limit of his responsibility is only reached when the machinery is safe for all except the incalculable person against whom no reasonable foresight can provide—the individual who does not merely do what is unlikely but also what is unforeseeable, or, at least, not to be foreseen by any ordinary man.

Per Denning L.J., on the issue whether lack of fencing of an exposed and dangerous part of machinery was shown by the plaintiff to be the cause of a workman's death:—It is not accurate in these cases to speak of the burden being on the occupier to disprove causation. The legal burden is always on the plaintiff to prove that the lack of fencing caused the death; but when

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the plaintiff proves facts from which causation *may* legitimately be inferred, the occupier may well think it wise to call evidence in the hope of inducing the court not to draw the inference. In that sense there may be a provisional burden on the occupier raised by the state of the evidence, but that is all: it is not a legal burden, and, even if the occupier calls no evidence, at the end of the case the court must, in any event, make up its mind whether or not to draw the inference.

APPEAL from Mr. Commissioner Gentle K.C. sitting at Glamorgan Assizes.

At the Gelli Colliery a conveyor belt, called the raw coal belt, 3 feet 3 inches wide travelled along an incline from a motor-house to the surge bunker at the tension end. The belt was endless and 240 feet in length. The upper part travelled upwards to the tension roller over which it passed, and then downwards, back to the motor-house, passing above the front wall of the motor-house over a jockey roller 9 inches in diameter, placed slightly back from the outside face of that wall and a few inches higher. Thence it continued downward so as to pass under and round the driving roller 3 feet in diameter, and so out of the motor-house again on its continous journey. The pace of the belt was about 720 feet per minute or 1½ miles per hour, and the tension on the lower part of the belt, at or near its junction with the jockey roller, was about 5,000 lb.

The motor-house was an enclosed brick construction containing an electric motor, the driving roller and the jockey roller supported on two iron girders 8 feet 6 inches from the ground level. The girders rested in the back wall of the motor-house and stretched across the top of the 5 feet 9 inch front wall of the house, projecting some feet outwards from it. Access was obtained to the motor and rollers by a ladder sited in the right-hand side of the motor-house (facing it).

An angle-iron rested further out across the two girders away from the front wall. The top of the wall, the projection of the two girders and the cross piece of the angle-iron made an open " aperture " 3 feet 3 inches by 10½ inches, facing towards the floor level. Through it access to the jockey roller situated above and a few inches back from the front wall could be gained.

There was outside the front wall on June 11, 1948, a spillage of coal the top of which was 1 foot 9 inches high. The distance, therefore, from the top of the spillage to the top of the front wall was 4 feet. On that date the belt became overloaded with coal, which resulted in congestion at the bunker end, and damage was done to the side of the belt. It was frayed and large portions of it were hanging down. To rectify this the foreman in charge of the locality, Smithwick, who had been employed at the colliery for 20 years, was seen by two other men, Zobole and Collins, to be walking along the catwalk, on the right-hand side (facing the motor-house) of the belt, towards the bunker and then coming back towards the house. He was asked if he wanted any help, and replied " No," but that he would give them a shout if he did. After an interval, the belt still revolving in its torn condition, Zobole went down to the house and switched off the engine. Collins then found Smithwick against the outside of the front wall of the motor-house with his feet on the spillage, " as if " he were standing." His left arm to his elbow was upwards and through " the aperture." Collins said that the left arm was between the jockey roller and the belt—" the nip." Asked whether the left arm was actually between the belt and the roller, he replied that " he would not say to be sure, " but he would say that way."

In cross-examination the witness said that he should think that if the arm was between the belt and the roller it would scrape the clothes and the flesh from the arm ; the pressure would be tremendous. The witness said that Smithwick's head was tight against the jockey roller, the left side of the forehead near the left eye and temple being against the roller. The witness said that he pressed up the belt (now stationary) with his left hand and released Smithwick, who came back into his right arm. He was dead. In re-examination the witness added that he could not remember if he had difficulty in pushing up the belt. It was ripped in threads or narrow strips, which were twisted round the driving roller. The belt was found to be in threads or narrow strips on the left side (facing the house).

The deceased was 5 feet 8 inches tall. There was no injury to his left hand or forearm ; but there was a compound fracture of the left humerus. There was slight laceration of the head on the left side : the left ear was almost completely torn off. There was no evidence of injury to the right side or top of the head. The medical evidence was that death was due to laceration of the brain.

The deceased's widow claimed damages against the National Coal Board, alleging that the death of her husband was due to

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breach of statutory duty and negligence on the part of the board.

The statutory duty of which a breach was claimed is contained in s. 55 of the Coal Mines Act, 1911 (1) By their defence the board pleaded that the jockey roller and belt at which the deceased was injured were not "exposed and "dangerous parts of the machinery" within the meaning of s. 55, and that therefore they were not required to fence them. They also pleaded that the fatal injury was caused by the deceased himself, giving as particulars the thrusting of his left arm through "the aperture."

At the trial the manager of the colliery put forward a new theory, which the commissioner said was open to the board on their pleading, that the injury had not resulted from any peril from "the aperture." The manager said that he thought that the deceased went under the belt, where he must have caught hold of a piece or pieces of torn belt and so was dragged over the angle-iron and over the top of "the aperture."

The commissioner rejected that theory as being mere speculation without evidence to support it. It was negatived by the position in which the body of the deceased was found. He said that he accepted the evidence of Collins regarding the position in which he found the deceased's body, except that he thought him mistaken when he said that the deceased's left hand and arm were in "the nip" between the belt and jockey roller. He found in favour of the plaintiff that her husband's death was due to the board's breach of statutory duty in not fencing "the aperture." He negatived contributory negligence, and awarded her 2,700*l.* damages.

The National Coal Board appealed.

The question before the Court of Appeal was only whether the plaintiff could recover for breach of the statutory duty contained in s. 55 of the Coal Mines Act, 1911.

Glyn Jones K.C. and *Owen George* for the board. There was no duty, under s. 55 of the Coal Mines Act, 1911, on the defendants to fence "the aperture." The parts of the machinery—the belt and the jockey roller—even if they were exposed, were not "dangerous," since, in effect, they were inaccessible. "The aperture" faced downwards to the

(1) By s. 55 of the Coal Mines Act, 1911: "Every fly-wheel and "all exposed and dangerous parts "of the machinery used in or "about the mine shall be kept "securely fenced."

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ground and there could be no reason for anyone to creep underneath the belt, and put either arm or head through "the aperture." But to create the duty, the part of the machinery must be not only dangerous but "exposed," and that word must have some meaning beyond that of "dangerous." The belt and jockey roller were neither "exposed" nor dangerous. If a workman goes and puts his arm or head into a machine whilst it is working, that does not render any part of the machine exposed or dangerous: see the judgment of Scrutton L.J. in *Higgins* v. *Harrison* (1) and of Lord Goddard C.J. in *Carr* v. *Mercantile Produce Co. Ld.* (2).

[TUCKER L.J. Lord Hewart C.J. considered the meaning of the word "exposed" in s. 55 of the Coal Mines Act, 1911, in *Carey* v. *Ocean Coal Co. Ld.* (3).]

It is submitted that Lord Hewart's construction of the section is inconsistent with that of Lord Goddard C.J. of s. 14 of the Factories Act, 1937, in *Carr's* case (2), and that the Court of Appeal should follow the latter. To show that a person can physically get his hand into a machine does not necessarily show that a part of the machine is either "exposed" or "dangerous." Slesser L.J., in *Higgins* v. *Harrison* (4) on this issue quoted from the judgment of Wills J., in *Hindle* v. *Birtwistle* (5), when he said: "It seems to me that machinery "or parts of machinery is and are dangerous, if, in the ordinary "course of human affairs, danger may be reasonably anticipated "from the use of them without protection. No doubt, it "would be impossible to say that, because an accident had "happened once, therefore the machinery was dangerous. "On the other hand, it is equally out of the question to say "that machinery cannot be dangerous unless it is so in the "course of careful working. In considering whether machinery "is dangerous, the contingency of carelessness on the part "of the workman in charge of it and the frequency with which "that contingency is likely to arise, are matters which must "be taken into consideration. It is entirely a question of "degree."

But even if the moving belt and the jockey roller were exposed and dangerous parts of machinery used in or about a mine which were not kept securely fenced, the plaintiff never discharged the onus on her of showing that the death

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(1) (1932) 25 B. W. C. C. 113, 124.

(2) [1949] 2 K. B. 601.

(3) [1938] 1 K. B. 365.

(4) 25 B. W. C. C. 113, 124.

(5) [1897] 1 Q. B. 192, 195.

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of her husband was due to the failure to fence. To succeed, she must show that the death was due to that peril: see *Gorris* v. *Scott* (1). As Professor Winfield wrote in his Textbook of the Law of Tort (4th ed.) at p. 158: "On the other "hand, if the object of the statute was to prevent mischief "of a particular kind, one who suffers from its non-observance "loss of a different kind cannot twist its remedy into an "action for his own recoupment." As was said by Lord Macmillan in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (2), quoted by Greene M.R. in *Stimpson* v. *Standard Telephones and Cables Ld.* (3): "It must be shown that the "accident was causally associated with the breach of statutory "duty," and, as he further said in *Stimpson's* case: "It "would not be sufficient to show that a workman was found "in the neighbourhood of a dangerous machine unconscious, "with a wound upon him which might have been caused by "the dangerous part of the machine, or might have been caused "in some other way by the use of, for instance, a hand tool "which the workman had to use. If that were all that "appeared, then, although the breach of statutory duty "would be established, it would not be shown that the accident "was causally associated with the breach of statutory duty, "because the facts would be equally consistent with it having "been due to some other cause." See also *Wakelin* v. *London and South Western Railway Company* (4).

Collins' evidence appears to be inconsistent with the medical evidence. This was appreciated by the commissioner in that he found that the left hand or forearm of the deceased was not fixed in "the nip" between the belt and the jockey roller. If either had been so fixed, the hand or forearm would have shown signs of injury: there were no such injuries. What, in fact, retained the body of the deceased, as if in a standing position, before it slumped into Collins' arms? The answer to that question is not known. There is no hypothesis as to how the deceased came by his injury to his humerus or, for that matter, to his left ear or brain. There is not explanation how the accident happened, and there is no proper inference, based on evidence, to show how it happened. The peril against which it is claimed that the defendants were bound to fence was "the nip" between the

(1) (1874) L. R. 9 Exch. 125.
(2) [1940] A. C. 152, 168.
(3) [1940] 1 K. B. 342, 351.
(4) (1884) [1896] 1 Q. B. 189*n* and (1886) 12 App. Cas. 41.

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belt and the jockey roller. And the one fact established on this issue was that the death of Smithwick was not caused by any part of his body being caught between the belt and the jockey roller.

Lastly, if this workman did in fact place either his left hand and upper arm or his head through "the aperture" without turning off the switch to stop the machine, it is difficult to suggest a clearer case of contributory negligence, that being, in effect, the sole cause of his injury.

Edmund Davies K.C. and *Alun T. Davies* for the plaintiff. There was no ground on which it can be said that the evidence of Collins was erroneous. The deceased man was foreman at the belt, and it was one of his jobs to feed the bearings at the motor-house with oil. The ladder by which entry was obtained to the upper part of the motor-house, where the electric motor and the two rollers were, was on the right-hand side to any one facing the front wall of the house. A natural way, therefore, from the left-hand side of the belt to the ladder was along the front of the motor-house. On this path the deceased would have his left side next to the wall, and "the "aperture" was four feet from the top of the heap of spillage. In view of these facts, it cannot be said that the belt and the jockey roller at their junction were not exposed and dangerous parts of the machinery. The fact of the constant presence of spillage at the base of the front wall of the motor-house is of importance, not only because a person using this path from the left to the right of the belt would have to bend down, but also because it would bring men from time to time to that place to clear away the spillage. Men were therefore constantly close to this position of danger, and it was evident that those parts of the machinery were both exposed and dangerous.

On this issue of what are dangerous parts of machinery, it is stated in Redgrave's Factories, Truck and Shop Acts (17th ed.) at p. 33: "The behaviour of human beings that "has to be regarded is such behaviour as is reasonably fore-"seeable, which is not necessarily confined to such behaviour "as is reasonable behaviour." The test applicable as to what part of the machine is dangerous is foreseeability of danger. The occupier must guard against all conduct which he can reasonably foresee. As a judge of first instance, du Parcq J. said in *Walker* v. *Bletchley Flettons Ld.* (1):

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(1) [1937] 1 All E. R. 170, 175.

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"A part of machinery is dangerous if it is a possible cause "of injury to anybody acting in a way in which a human "being may be reasonably expected to act in circumstances "which may be reasonably expected to occur." And this he later explained and emphasized when a Lord Justice in the Court of Appeal in *Stimpson* v. *Standard Telephones & Cables Ld.* (1).

That the lack of fencing caused the laceration of the brain is clear from the position in which the body was found by Collins. The onus of proving contributory negligence lies on the defendants, and they have not discharged it.

Glyn Jones K.C., replied.

TUCKER L.J. The commissioner rejected the theory put forward by the manager of the mine that the deceased was dragged over the angle-iron and so was not in any peril from "the aperture." I find myself in entire agreement with the opinion and findings of the commissioner, and I do not propose to deal with that aspect of the matter in any detail.

The main case put forward by Mr. Glyn Jones in this appeal is that, however that may be, the plaintiff has not discharged the onus which lay upon her of showing circumstances from which the court could reasonably and properly draw the inference that the accident was due to a peril in respect of which there was a duty to fence; and he quite properly drew our attention to the fact that it was necessary for the plaintiff to show that the accident was due to that peril. That is the principle for which he contended.

Examples of that principle are to be found in such cases as *Gorris* v. *Scott* (2). The principle is thus stated in Professor Winfield's Textbook of the Law of Tort (4th ed., p. 158): "On "the other hand, if the object of the statute was to prevent "mischief of a particular kind, one who suffers from its "non-observance loss of a different kind cannot twist its "remedy into an action for his own recoupment." It was also referred to by Greene M.R. in *Stimpson* v. *Standard Telephones & Cables, Ld.* (3). In that case, quoting from the speech of Lord Macmillan in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (4) he said: "First I find this "in the speech of Lord Macmillan: 'The mere fact that "'at the time of an accident to a miner his employers can be

(1) [1940] 1 K. B. 342, 359–60.
(2) L. R. 9 Exch. 125.
(3) [1940] 1 K. B. 342, 351.
(4) [1940] A. C. 152, 168.

" ' shown to have been in breach of a statutory duty is clearly " ' not enough in itself to impose liability on the employers. " ' It must be shown that the accident was causally associated " ' with the breach of statutory duty.' I take that to mean this. " Adopting an example put by MacKinnon L.J., in the course " of the argument, it would not be sufficient to show that " a workman was found in the neighbourhood of a dangerous " machine unconscious, with a wound upon him which might " have been caused by the dangerous part of the machine, " or might have been caused in some other way by the use of, " for instance, a hand tool which the workman had to use. " If that were all that appeared, then, although the breach " of statutory duty would be established, it would not be shown " that the accident was causally associated with the breach " of the statutory duty, because the facts would be equally " consistent with it having been due to some other cause."

That, therefore, is the position. In his judgment the commissioner, after referring to what was done after the accident, said this: " It was conceded by learned counsel for the board " that if a man is found dead in circumstances suggesting " that he was injured on account of the non-fencing of " dangerous machinery, the obligation is upon the employer " to show that the accident causing death occurred by other " means. In the present instance, accepting, as I do, Collins' " evidence that he found the deceased against the wall, his " head through the aperture tight against the roller, with his " left arm upwards, his position was in close proximity to " dangerous machinery, which should have been, but was not, " fenced." From that he drew the inference that the death of the deceased was caused by the peril, and said that the defendants had not given any evidence or advanced any theory to displace that inference.

That position is accepted by Mr. Glyn Jones as being the proper approach to the matter. The only criticism which he makes is in regard to the use by the commissioner of the words " in circumstances suggesting that he was injured on " account of the non-fencing of dangerous machinery." But that, no doubt, was merely another way of saying " in circum- " stances in which a legitimate inference might reasonably " be drawn." I think that that is all the commissioner meant to say—and I think that these words really amount to the same thing.

Then Mr. Glyn Jones argued that the fact that the commissioner rejected that part of Collins' evidence which said that he found the deceased's arm pinned in the nip, between the belt and the jockey roller (if that is really what Collins meant to say—and his evidence shows perhaps some little doubt about it), leaves the case in this position, that really there is no explanation of how the accident happened, and that it might just as well have happened in the way suggested by the manager of the mine, or in some other way not connected with, or materially contributed to, by the dangerous machinery. This matter is, of course, to a certain extent mysterious. Nobody can explain exactly why the deceased should have been in the position spoken to by Collins, or what he was doing there; nor can anybody give a detailed reconstruction of the accident or account for the deceased's injuries.

Much stress was laid upon the fact that the doctor, according to his evidence, did not notice any injury to the deceased, except on one side of his head. He was called to the scene of the accident shortly after the body of the deceased had been found. He said that the man's clothing was hardly damaged at all, that there was some blood which appeared to have come from behind the left ear, which had been torn, that he found no injury to the hand or forearm (that is the left hand or forearm), but found that there was a compound fracture of the left humerus at a spot which he indicated as being above the elbow. (There was some controversy as to how far above the left elbow it was, but it was somewhere between the elbow and the shoulder.) Then he was asked about the lacerations. First of all he said that there were no lacerations of any kind, and then he said: "The left ear was almost "completely torn off and there was slight laceration where the "head had hit, I presume, against the wall." Then he said that the lacerations were not extensive, and that he formed the opinion that death was due to laceration of the brain.

The submission made by Mr. Glyn Jones was that the absence of any evidence from the doctor (who did not have his notes with him and who had given evidence at the inquest shortly after the accident similar to that which he was giving before the commissioner some eighteen months afterwards) about noticing any injury on the other side or top of the head and the fact that there was no damage to the man's clothing, make it impossible to draw the inference that his death was in any way caused by the moving belt or the revolving jockey roller. I cannot accept that submission.

It is not, I think, necessary for the plaintiff to establish in precise detail how the accident happened, or to account for every injury sustained by the deceased man. It is common ground that it is difficult in any circumstances to explain exactly how his left arm came to be fractured in the way that it was. After all, what we are inquiring into is what caused his death. The medical evidence was that it was due to laceration of the brain. The dead man's head was found tight up against the jockey roller, and, according to the evidence of Collins, he was lodged in some way in that position—although the commissioner rejected the suggestion that he was pinioned by his arm under the belt. I think that the evidence of Collins, who described how he released the deceased and how the body slumped into his arms, shows that the deceased was wedged somehow or other in the position spoken of. I cannot say that it is not a possible inference to draw from those facts that his head was in some way drawn by this moving belt against the roller to which it was found tightly pressed, the left ear being torn. That seems to me to indicate a high probability of a dragging motion or a violent impact with the belt and contact between the belt and the roller. And that is sufficient, unless it is shown, because of the broken humerus, that the laceration of the brain could not have been caused in the way described. It is really not necessary to account for the broken humerus; but it may have been caused through some action of the man in trying to free himself when he felt his head being drawn into the position described. It is, of course, the fact (and it is not altogether easy to explain) that no injury was found at the top or on the other side of the man's head; but, none the less, it is a common experience that accidents often happen without leaving any traces of injury in places where one would expect to find them. It is not always possible to reconstruct every occurrence of this sort.

I therefore think, on this part of the case, that the commissioner was quite entitled to draw the inference that he did draw; and, in fact, I think, in the absence of any other acceptable explanation, that it was the only inference that could be drawn. I think that the accident was due to the peril with regard to which, it is assumed for the moment, there was a duty to fence. But that is another matter, to

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which I will shortly pass. I think that Mr. Glyn Jones has sought to confine the peril rather too narrowly. He sought to argue that the only peril was the precise point of contact between the belt and the roller, or what has been described as " the nip." I think that the whole of the contents of that aperture was a peril because of these two moving objects which it contained, and that the reasonable inference is that, somehow or other, the accident happened as a result of these two moving objects.

That being so, the next question is : was that a dangerous and exposed part of the machinery ? Section 55 of the Coal Mines Act, 1911, provides that, " every fly-wheel and all " exposed and dangerous parts of the machinery used in or " about the mine shall be kept securely fenced." It was contended that this was not a dangerous part of the machinery, because, although the nip was dangerous to anybody who came near it, and although it was not fenced, it really was not in an accessible part of the premises : that is to say, the argument was that nobody could reasonably be supposed to be likely to come anywhere near it. The test of what is a dangerous part of the machinery has been laid down from time to time.

The first case usually cited on this matter is that of *Hindle* v. *Birtwistle* (1). In that case, Wills J. (2) made a statement, which was cited with approval by Slesser L.J., in *Higgins* v. *Harrison* (3), as follows : " It seems to me that machinery " or parts of machinery is and are dangerous if in the ordinary " course of human affairs danger may be reasonably anticipated " from the use of them without protection. No doubt it " would be impossible to say that because an accident had " happened once therefore the machinery was dangerous. " On the other hand, it is equally out of the question to say " that machinery cannot be dangerous unless it is so in the " course of careful working. In considering whether machinery " is dangerous, the contingency of carelessness on the part of " the workman in charge of it, and the frequency with which " that contingency is likely to arise, are matters that must " be taken into consideration. It is entirely a question of " degree."

In the same case (*Higgins* v. *Harrison* (3)), Scrutton L.J., had laid down certain matters which should be taken into

(1) [1897] 1 Q. B. 192.
(2) Ibid. 195.
(3) 25 B. W. C. C. 113.

consideration in deciding this question of fact and this question of degree. He said (1): "The first question is: was the "machinery dangerous? I have looked at the photographs: "I have considered the way in which the girl usually worked "the machine; I have considered the fact that on those four "machines there had been no accident for sixteen years, "although they were unfenced. I have considered the fact "that the inspector of the Government had frequently seen "those machines and had never required them to be fenced, "and I have come to the conclusion, having the same "opportunity of judging as the learned judge in the court "below had (because nothing turns on the evidence of "witnesses) that that was not a dangerous machine. Of "course, it was dangerous if you went and put your hand "into it; every machine is dangerous if you go and put your "hand into it whilst it is working."

In *Walker* v. *Bletchley Flettons Ld.* (2), Du Parcq J., said ". . . . a part of machinery is dangerous if it is a possible "cause of injury to anybody acting in a way in which a human "being may be reasonably expected to act in circumstances "which may be reasonably expected to occur."

In *Carr* v. *Mercantile Produce Co., Ld.* (3), Lord Goddard C.J., discussing the point that a factory inspector had found no fault with a machine, said: "The fact that they have passed "a machine, not only once but on several occasions, without "comment or requiring anything to be done, is at least some "evidence that in the opinion of a duly qualified person no "accident is reasonably likely to occur, provided workpeople "act in a way in which they may be reasonably expected "to act."

I think that those cases show what is the test to be applied, and I think that the principle of them is very conveniently and accurately summarized in Redgrave's Factories, Truck & Shop Acts (17th ed.) at p. 33, where the learned author says: "The behaviour of human beings that has to be regarded "is such behaviour as is reasonably foreseeable, which is not "necessarily confined to such behaviour as is reasonable "behaviour." An employer, of course, has to contemplate acts of carelessness, acts of negligence, and so on, but he has not to fence what would otherwise be a dangerous part of the machinery which is really inaccessible and which no ordinary

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(1) 25 B. W. C. C. 118.

(2) [1937] 1 All E. R. 170, 175.

(3) [1949] 2 K. B. 601, 605.

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reasonable workman would be expected to go anywhere near or to come into contact with in any way.

The present case is on this point, I think, rather near the line, because it is not altogether easy to explain what took the deceased man to the spot where his body was found. In his judgment the commissioner said: " There was no prohibi-" tion against the use of the route I have mentioned." Of the route he had said this: " The deceased was 5 feet 8 inches " in height. If he proceeded along the wall over the mound " towards the ladder," (against the right wall of the motor-house) " his left side would have been close to the front wall; " he would have to stoop, or bend his head, below the first " girder, the aperture between the two girders, and under the " second girder, and if he was upright, or raised his head, " when between the two girders, then his head would go into " the aperture and be about level with and not more than " one foot away from the jockey roller to his left. To avoid " his head being in that position, he would have to remain " in the stooping or head-bent posture while passing below " the girder. I am unable to accept that there was nothing " which would take the deceased along the route by the wall. " Whilst, as it is stated, it may not have been the most con-" venient way to get from the left of the motor-house to the " ladder, it was the more direct and not unlikely way to be " used." Then, a little later, he went on to say: " There was " no prohibition against the use of the route I have mentioned, " or against any employee being against the wall of the engine-" house. The wall was a route which the defendant board, " in my view, should reasonably have foreseen and which it " was foreseeable might be used, and, if used, would entail " passing immediately underneath the aperture leading to " dangerous machinery, which was a short distance from the " opening of the aperture."

Mr. Edmund Davies has drawn our attention to the fact that there was evidence that men from time to time had to come and clear away the spillage which accumulated at this spot in order to prevent the mound from getting too high, and that they would necessarily be working very close to this position of danger and might well get their heads into this aperture if they were forgetful and stood upright when they were on the top of the mound of spillage; and it is in fact the existence of this mound of spillage which I am rather inclined to think is the turning point of the case on this question, because it may well be that if there had been no spillage there, the aperture would have been at such a height from the ground as not to have been a danger.

The evidence of the expert called on behalf of the defendants on this part of the case was: "(Q.) You are asked "particularly, the height you saw this roller, and in "relation to the wall: what do you say about fencing? "(A.) Do you mean when the spillage was there; a very "different state of things when the spillage is there and when "it is not. (Q.) When the spillage is there, what do you "say? (A.) The entrance to the hole is then accessible. "(Q.) When you say 'the hole' do you mean the aperture? "(A.) Yes. (Q.) What do you say then is accessible? "(A.) But I can conceive of no reason for entering it." That is what was conclusive, in his view. Then, a little later, he was asked why he recommended fencing: "(Q.) "Would you have fenced this aperture of 10½ inches "supposing you had been directed to make a minute inspection "of this mine? (A.) Would I have fenced it?—No. (Q.) "Why not? (A.) Because I do not think it is a dangerous "spot. (Q.) Although the machinery is dangerous and "although the 10½-inch aperture is easily accessible to a "person who inadvertently raises his hand, you do not regard "it as a dangerous spot? (A.) I regard it as a dangerous "spot, but not a spot you should fence against, because it is "not a place where a man is going to put his arm. You might "as well suggest that a man would put his arm in an open "furnace. (Q.) I thought you said it was easily getatable "by a man. (A.) When there is spillage. (Q.) As we "know there was on this occasion. (A.) Yes."

I have come to the conclusion on the whole that the commissioner came to a right decision when he held that, in the circumstances and having regard to the position of this aperture and the height of the spillage, this machinery was dangerous and was exposed.

That being so, there only remains the question of contributory negligence. The particulars of that allegation were: "The deceased thrust his arm upwards and sideways through "a space about 9½ inches wide between the upper edge of the "brick wall and an angle iron, and thus deliberately thrust his "arm through the said space." I do not think that, on the findings of the commissioner, the accident in fact happened in the way alleged in the defence. But however that may be, I think the defendants have failed to discharge the onus which lies upon them of showing contributory negligence on the part of the deceased man. It is quite unexplained exactly why or in what circumstances the deceased man put himself in this position of danger: we do not know whether he put his arm up first, or whether he put his head up looking for something or to see something that he thought had gone wrong, which would be easily visible through this aperture. That is a matter which is completely wrapped in mystery. Of course, prima facie, it would be an extremely dangerous thing for a man to do to put his arm into this aperture and feel about inside it—that would probably be a dangerous thing to do in any event. We have not had the deceased's explanation of what he was doing at the time of the accident. That matter is entirely at large. I think, in the circumstances, that it is quite impossible to say that the defendants have discharged the onus which lies upon them of proving their allegation of contributory negligence. This appeal therefore fails and must be dismissed.

SOMERVELL L.J. I agree, and, as my reasons for thinking that this appeal fails have been so fully expressed by Tucker L.J. I need say very little. I agree that the most difficult question in this case is whether there was a duty on the defendants to fence. For the reasons which Tucker L.J., has given, and particularly having regard (as shown on the plan) to the distance between the aperture and the jockey roller—and, indeed, the belt itself—when spillage was there and was at the height shown on the plan, namely, 1 foot 9 inches, I think that this machinery, having regard to its nature and as spoken to by the witnesses, does come within s. 55 of the Coal Mines Act, 1911, and that there was a breach of statutory duty on the part of the defendants in not fencing it adequately.

I have nothing to add to what my Lord has said on the other two points.

DENNING L.J. I agree. The first point that arises for decision is whether the various parts of the machinery near the point where the belt passed over the jockey roller were exposed and dangerous parts within s. 55 of the Coal Mines Act 1911. I think that the test for this purpose is substantially the same as the test whether machinery is "dangerous" within the Factories Act, 1937. It is "dangerous" if it is such that it

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may reasonably be foreseen to be a source of injury to people who may be in the vicinity, taking them with all the ordinary infirmities to which human nature is prone. The occupier must realize that not everybody is careful: many are hasty, careless or inadvertent; some are unreasonable, or even disobedient. It may be unlikely that they will act in such a way, but it is not only the likely but also the unlikely accident against which the occupier must guard. He must guard against all conduct which he can reasonably foresee. The limit of his responsibility is only reached when the machinery is safe for all except the incalculable individual against whom no reasonable foresight can provide—the individual who does not merely do what is unlikely, but also what is unforeseeable, or, at least, not to be foreseen by any ordinary man. That, I think, appears from the classic passage in the judgment of Du Parcq J., in *Walker* v. *Bletchley Flettons Ld.* (1), as explained and amplified by him in *Stimpson* v. *Standard Telephones & Cables Ld.* (2).

Applying this test, I agree with my Lord that this case is near the line. Although one would not think it likely that a man would get his head or arm into this aperture, I think it might reasonably be foreseen as a possible thing which might happen. If there were a hold-up in the movement of the conveyor belt, a workman might look inside to see if he could discover what was wrong; or a man clearing away the spillage might, on straightening himself up, accidentally get his head inside the aperture. Once a man got his head, or arm, inside, the moving machinery would be very likely to injure him. The possibility of injury might, therefore, reasonably have been foreseen. It follows that the machinery was dangerous and exposed. At any rate, the commissioner came to that conclusion, and I should not be disposed to differ from him on what is, after all, a question of degree and therefore of fact: see the judgment of Lord Goddard C.J., in *Carr* v. *Mercantile Produce Co., Ld.* (3).

The second question is whether the lack of fencing was a cause of the deceased's death. Mr. Glyn Jones says that it is mere guesswork and not a legitimate inference from the known facts. As Lord Macmillan said in *Jones* v. *Great Western Railway Co.* (4): "The dividing line between con-"jecture and inference is often a very difficult one to draw";

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(1) [1937] 1 All E. R. 170, 175.
(2) [1940] 1 K. B. 342, 359–60.
(3) [1949] 2 K. B. 601.
(4) (1930) 144 L. T. 194, 202.

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but it is just the same as the line between some evidence and no evidence. One often gets cases where the facts proved in evidence—the primary facts—are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately, refuse to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn: that is to say, if it is an inference which no reasonable person could draw.

I do not think that it is ever really accurate in these cases to speak of the burden being on the occupier to disprove causation. The legal burden is always on the plaintiff to prove that the lack of fencing caused the death: but when the plaintiff proves facts from which causation may legitimately be inferred, the occupier may well think it wise to call evidence in the hope of inducing the court not to draw the inference. In that sense there may be a provisional burden on the occupier raised by the state of the evidence, but that is all. It is not a legal burden, and, even if the occupier calls no evidence, at the end of the case the court must in any event make up its mind whether or not to draw the inference (1).

In this case the primary facts are that the man was found dead with his head and arm inside the aperture, close to the machinery, with marks of violence upon him. It is no mere guess, but a legitimate inference, that the want of fencing was one of the causes of the man's death. The commissioner drew that inference, and I think he was justified in so doing.

The third question is whether another cause of the accident was the man's own contributory negligence. I do not think that the defendants have shown that it was. We simply do not know what brought him where he was. He may have gone there to see if he could find out what was wrong, and I should not myself castigate that as negligence.

I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. H. F. Barklam, Cardiff; Theodore Goddard & Co. for Morgan, Bruce and Nicholas, Pontypridd.*

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(1) (1945) 61 L. Q. R. 379.

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Feb. 15, 16, 17; *Mar.* 1.

Cohen and Asquith L.JJ. and Roxburgh J.

Negligence—Invitor and invitee—Licensor and licensee—Person using a public convenience without charge—Hidden "danger" of which occupier "knows"—Meaning—Knowledge of facts and of potential danger.

When a licensee is injured on land occupied by the licensor, he can only maintain an action against his licensor when the hidden danger through which he has sustained hurt was one of which the licensor knows but of which the licensee did not know. The licensor knows of the danger if he knows that (*a*) there is present a physical object capable of being put in a dangerous condition, (*b*) by the action of third persons, (*c*) who are likely to act in such a way as to put it in a dangerous condition, having regard to their past behaviour or inherent qualities.

Coates v. *Rawtenstall Corporation* (1937) 157 L. T. 415 followed.

And this is so, although the licensor could not know, and did not foresee, the precise manner in which the dangerous condition would translate itself into an actual casualty.

The entrance to a public sanitary convenience occupied and controlled by a local authority was between two walls enclosing steps of descent. It was protected at night by a sliding grille, running between the tops of the two walls, to a gate where it was fastened by a hasp, 1½ inches long projecting downwards, and locked. By day the grille was pushed back into a recess, but not locked, there being no apparatus with which to lock it. The plaintiff descended to the convenience by day, when the grille was pushed back into its recess, and used the urinal; but on his ascending the steps, the grille having, since his descent, been pulled forward part of the way towards the gateway, his head struck the hasp hanging down from the grille and he received injury for which he claimed damages against the local authority, alleging that the failure to lock the grille back in its recess by day invested it with the quality of a "trap."

In other similar public conveniences occupied and controlled by the local authority, a similar grille was padlocked back in its recess by day. It was proved that servants of the authority, and so the authority, had knowledge (*a*) that children had persistently and for a long period tampered with the grille, in particular, by swinging on it, and that they had done so on the very morning when the plaintiff was injured; (*b*) that it did not require any force to pull the grille out; and (*c*) that the swinging of the children could have moved the grille forward a little. It was found by the trial judge that, while the plaintiff was using the urinal, mischievous children had pulled the grille forward.

Held, that the plaintiff at the public convenience was a licensee and not an invitee of the authority.

Ellis v. *Fulham Borough Council* [1938] 1 K. B. 212; *Coates* v. *Rawtenstall Corporation* (1937) 157 L. T. 415; and *Glasgow Corporation* v. *Taylor* [1922] 1 A. C. 44 followed.

Per curiam. Had the issue been free from authority, and had the observations of Lord Greene M.R. in *Baker* v. *Bethnal Green Borough Council* (1945) 43 L. G. R. 75, at p. 79, formed part of the ratio decidendi, the court would have felt themselves impelled to the conclusion that the local authority were invitors, acting as they were from motives of civic duty and in pursuance of their public functions and providing an essential sanitary service.

It is not clear that the "common interest" which an invitor and invitee have may not exist where no pecuniary gain, immediate or remote, is the aim: see *Nickell* v. *City of Windsor* [1927] 1 D. L. R. 379.

Held, further, that the authority, by their servants, "knew" of the danger, and therefore that the plaintiff, though a mere licensee, should succeed in his action.

Quaere whether, as suggested but not determined by Lord Greene M.R. in *Baker* v. *Bethnal Green Borough Council* (supra), if a licensor knows the facts which objectively constitute the danger and, if any reasonable person would know that those facts did constitute a danger, he could not be heard to say that he had not that knowledge; a view which would justify the obiter dicta of Lords Atkinson and Wrenbury in *Fairman* v. *Perpetual Investment Building Society* [1923] A. C. 74, at pp. 86 and 96, and of Lord Hailsham L.C. in *Robert Addie & Sons* (*Collieries*), *Ld.* v. *Dumbreck* [1927] A. C. 358, at p. 365, that a licensor was liable in respect of a "trap" of which he "ought to know,"—these words being used in a sense different from that with which they are used in the case of invitors, that is, with a narrower meaning.

APPEAL from Lambeth county court.

A public sanitary convenience, containing urinals and water closets, owned, occupied and controlled by the defendants, Lambeth Borough Council, was entered by passing through a gateway set between two parallel low walls above street level, and by descending by steps to the convenience below street level. The walls were open to the sky, near the gateway, but further back were roofed. At night time, a grid or grille running easily on rollers was pulled forward from the roof, over the open space between the tops of the two walls, to the gate at the entrance, where it was fastened by means of a 1½-inch hasp of metal projecting downwards from the centre of the front of the grille. The gate being shut and the gate and grille locked, all access to the convenience was blocked. At 10.50 a.m. on October 2, 1948, when the grille was in its daytime position, pushed back over the roof, but not locked in that position, there being no provision foı locking it in that position, the plaintiff entered the convenience and used the urinal, without charge. On ascending by the steps,

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his head came into violent collision with the hasp projecting below the grille, which, while he was in the convenience, had been pulled forward from the roof part of the way towards the gateway.

The plaintiff brought an action in the county court claiming damages for personal injuries caused, as he alleged, by the borough council's breach of duty as owners and occupiers of the convenience. It was alleged that the failure to padlock the grille back in its position over the roof by day invested it with the quality of a "trap." It was proved that at other conveniences owned and occupied by the council the grille could be locked back. It was conceded that the plaintiff was not guilty of contributory negligence.

The lavatory attendant said in evidence: "I had found "children swinging on the convenience gate on that morning, "before the accident, and on previous mornings. I had not "seen the children pull the grid. I had not known them "pull the grid over. I had seen them swinging on the "grid . . . . It does not require any force to pull a grid . . . . "No doubt the grid had been pulled over by children. . . . "If a child had swung on it it could have come forward to "a certain extent . . . . I had just previously driven away "some children. They were swinging on the grid. This was "about half an hour before the accident."

A painter, who was painting the outside of the ladies' convenience on the day and about the time of the accident, said: "Just previous to this accident I had chased away "boys from the top of the convenience" (the gentlemen's) "I did not see those boys interfering with the grid . . . "I had seen children swinging on this grid. That did not "pull the grid forward."

The superintendent of works of the borough council, after saying that grids did not move forward by themselves, went on: "I never heard of a grid being pulled forward by children "swinging on it . . . . We have had complaints about "children playing round these conveniences, and swinging "on grids and railings . . . . (for three or four years before "this accident). It was worrying to me . . . . If it had "been pointed out to me that the children might have moved "the grille by swinging on it, steps would have been taken "to stop the grid from being so moved. I do not think "children could have brought forward this grille by swinging "on it."

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The county court judge found as a fact that the grille was pulled forward by mischievous children who had been in the habit of tampering with it and had been swinging on it that very morning before the accident. The Court of Appeal found that there was ample evidence, given in the main by witnesses for the defence, to support the findings. The judge held (*a*) that the relationship between the parties was that of licensor and licensee; (*b*) that the licensor was only liable for a "trap" or hidden dangers of which he actually knew; and (*c*) that the council had no actual knowledge of the danger which caused the plaintiff's injuries. Accordingly, he gave judgment for the council, but provisionally assessed the damages at 66*l*.

The plaintiff appealed.

Stephen Terrell for the plaintiff. As Professor Winfield wrote in his Textbook of the Law of Torts (4th ed.) at p. 571: "A staircase which may have been safe enough when a man "descended it in the morning, may have become a trap when "he returns at night." This staircase became a "trap" within three minutes. On the view of the trial judge the borough council were licensors. If that is so, they knew of the physical facts constituting this danger: the sliding unlocked grille, the ease with which it could be pulled out, the habit of local children to swing from it and play with it. In fact, it was proved that at other conveniences under their control the grille was locked back by day. Why? To avoid this very danger. But if the borough council, by their servants, knew of these physical facts constituting the trap, they cannot be heard to say that they did not know of the danger to their licensees if a reasonable man would appreciate the danger. That contention was adumbrated by Lord Greene M.R. in *Baker* v. *Bethnal Green Borough Council* (1) but not determined, although he described it as attractive. This view would justify the obiter dicta of Lords Atkinson and Wrenbury in *Fairman* v. *Perpetual Investment Building Society* (2) and of Lord Hailsham L.C. in *Robert Addie & Sons (Colleries) Ld.* v. *Dumbreck* (3) that a licensor was liable in respect of a "trap" of which he "ought "to know"—those words being used in a sense different from that with which they are used in the case of invitors,

(1) (1945) 43 L. G. R. 75, 80.

(2) [1923] A. C. 74, 86 and 96.

(3) [1927] A. C. 358, 365.

that is, with a narrower meaning. Those obiter dicta have been described in *Coates* v. *Rawtenstall Corporation* (1) and in modern text books on tort as made per incuriam. The standard to be applied is that of the reasonable man. If the physical facts constituting the danger, objectively considered, are known to the licensor, then, if a reasonable man would appreciate the danger, the licensor cannot be heard to say that he did not.

But here the borough council, the licensors, knew not only of the physical facts, but also of the danger. If they did not, why did they lock back the grille by day in their other conveniences. From the evidence of their own witnesses, they knew of the children's habit of swinging on the grille and that this must imply that the grille would swing out. In *Ellis* v. *Fulham Borough Council* (2) the borough council did not know of the actual piece of glass which caused the injury to the licensee: but they had actual knowledge of the potential danger, as did the council here. But the case which is a clear authority for the contention advanced is *Coates* v. *Rawtenstall Corporation* (1). There the licensors knew of the physical object capable of being put into a dangerous condition by children, who, because they were children, were likely to put it into that dangerous position and who frequented that locus.

[ASQUITH L.J. In that case the defendants knew that a dangerous situation might be created, but they did not know the exact manner in which the actual casualty would occur.]

But the trial judge was wrong in holding that the plaintiff was a licensee: he was an invitee. The liability of persons entering premises of public authorities as of right was considered by Lord Greene M.R. and du Parcq L.J. in *Baker* v. *Bethnal Green Borough Council* (3) but not determined. Both their Lordships showed an inclination to consider the authority to be an invitor.

[ASQUITH L.J. referred to the note by R. W. Baker on "Liability of occupier to persons entering as of right" 64 L. Q. R., at p. 460, and to the article on "The liability of "public authorities as occupiers of dangerous premises to "persons entering as of right" in 65 L. Q. R., at p. 367, by E. P. Wallis Jones.]

In *Weigall* v. *Westminster Hospital* (4) a mother visiting

(1) (1937) 157 L. T. 415.
(2) [1938] 1 K. B. 212.
(3) 43 L. G. R. 75.
(4) (1936) 52 T. L. R. 301.

her son, who was a paying patient in an annexe to the Westminster Hospital, slipped on a mat which had been placed on a floor covered with highly polished linoleum. She was held to be an invitee. And in *Nickell* v. *City of Windsor* (1) a person who had entered a public library, and who, on leaving, had slipped on an ice-covered step, was held to be an invitee, yet she had made no payment. All the cases where the relationship of invitor and invitee have been held to be established seem to be cases where a plaintiff has entered buildings or structures.

[ROXBURGH J. It cannot be that if a child enters a public recreation ground she is a licensee and that when, in that ground, she enters a conservatory, she becomes an invitee.]

The opinion of Greer L.J., differing from that of Slesser L.J. and MacKinnon L.J. in *Ellis* v. *Fulham Borough Council* (2), appears to have been that a child entering a public recreation ground was an invitee, although he did not give judgment in that case on that basis. In *Stowell* v. *Railway Executive* (3), which came after *Horton* v. *London Graving Dock Co. Ld.* (4), the plaintiff went to Paddington Station to meet his daughter and her family arriving there by train. He slipped on an oily patch which he had not seen, and fell, sustaining injury. He was held to be an invitee.

But, on the special facts of this case, it was clear that the plaintiff here was an invitee of Lambeth Borough Council. Each party had a common interest in the entry of the plaintiff to their convenience. The interest of the plaintiff was to relieve himself. The interest of the council was that a nuisance should not be committed in the streets of their district and increase the burden of their expenditure in maintaining law and order and public sanitation. On a prosecution under by-laws relating to these matters, the first inquiry of the magistrate is: how far away was the nearest public convenience? If the plaintiff, when in the convenience, had paid a penny for the use of a closet, it could not be contended that he was not an invitee. Yet it does not follow that an invitee is always required to make a payment. A visitor to a shop, whose proprietors invite passers-by to come in and examine their wares, is an invitee. The plaintiff in *Weigall's* case (5),

(1) [1927] 1 D. L. R. 379.
(2) [1938] 1 K. B. 212.
(3) [1949] 2 K. B 519.
(4) [1949] 2 K. B. 584.
(5) 52 T. L. R. 301.

Stowell's case (1), and the Canadian case of *Nickell* v. *City of Windsor* (2) paid nothing. [*Cooke* v. *Midland and Great Western Railway Co. of Ireland* (3) and *Sutcliffe* v. *Clients Investment Co.* (4) were also cited.]

Dennis Thompson for the defendant borough council. *Sutton* v. *Bootle Corporation* (5) is the last of the recreation-ground cases, following *Glasgow Corporation* v. *Taylor* (6); *Coates* v. *Rawtenstall Corporation* (7), and *Ellis* v. *Fulham Borough Council* (8). These are authorities, binding upon this court, to show that a person entering, as of right, a recreation ground or public park controlled by a local authority is a licensee and not an invitee. Lord Greene M.R. in *Baker* v. *Bethnal Green Borough Council* (9) does not refer to *Coates* v. *Rawtenstall Corporation* (7), and his observations must be read subject to *Sutton's* case (5) which is a later decision. Here the defendant local authority are under no legal duty to provide public sanitary conveniences, but are merely empowered to do so: see s. 113 of the Public Health (London) Act, 1936. The plaintiff had permission to use the convenience, and, since the borough council were not bound to provide this convenience, that permission might be revoked. There is nothing to put the plaintiff in this case in any better position than the plaintiffs in the recreation-ground cases. He was a licensee.

Mere knowledge by a local authority, by their servants, of the possibility of a danger is not sufficient to create liability towards a licensee. Even where children are in the habit of trespassing and meddling with apparatus, and that is known to an occupier, he is not thereby rendered liable (in the absence of his own negligence) for every mischievous act of the children: *McDowall* v. *Great Western Ry. Co.* (10). For the local authority to incur liability there must be something to show that they knew that the actual mischief was not merely a possibility but a likelihood. In *Ellis'* case (8) the danger was accepted as a likely one. In *Coates'* case (7) the danger was in fact foreseen. Here, there was nothing to indicate that children were likely to pull the grille forward, although it was always a possibility. In fact the evidence

(1) [1949] 2 K. B. 519.
(2) [1927] 1 D. L. R. 379.
(3) [1909] A. C. 229.
(4) [1924] 2 K. B. 746.
(5) [1947] K. B. 359.
(6) [1922] 1 A. C. 44.
(7) 157 L. T. 415.
(8) [1938] 1 K. B. 212.
(9) 43 L. G. R. 75.
(10) [1903] 2 K. B. 331.

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is the other way, for, although known to swing on it, the children had never been known to pull the grille forward by swinging on it or otherwise. There was no connexion between what happened and what might have been expected to happen. It is only when what has happened may have been expected, i.e., is likely, to happen that an occupier is bound to take precaution: *Simons* v. *Winslade* (1).

Terrell replied.

Cur. adv. vult.

March 1. ASQUITH L.J., reading the judgment of the court :—This case raises two issues: (1.) Were the defendants, Lambeth Borough Council, in relation to the plaintiff, when he visited the convenience in question, invitors, and liable as such for hidden dangers not only of which they knew but of which they ought to have known? Or (2.), if they were not invitors, but merely licensors, may they not nevertheless be liable to the plaintiff on the facts of this case? [His Lordship stated the facts, referred to the county court judge's judgment, and continued :—] Accepting the finding that children had pulled the grille forward between the plaintiff's descent of the stairs and his reascent, in support of which there was evidence mainly from witnesses called for the defence, we will proceed (inverting the order in which we stated the two issues), to consider first whether the council are liable to the plaintiff on the basis that the latter was a licensee.

It is generally accepted that a licensor is only liable to a licensee for injury caused by hidden dangers of which the licensor "actually knew." What precisely is meant by "actually knowing of a danger" is by no means as easy a question as it sounds. The meaning of the word "know" and of the word "danger" are both in this connexion surprisingly elusive. We are satisfied at all events (notwithstanding certain expressions of opinion by very eminent judges, which would appear to be obiter dicta) that a licensor is not liable for dangers of which he does not actually know, but of which he ought to know, in the sense in which the words "ought to know" are used in *Indermaur* v. *Dames* (2). If it were otherwise, there would be no difference between the liability of an invitor and of a licensor. The dicta indicating a contrary view are contained in the speeches of two Law

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(1) (1938) 159 L. T. 408.

(2) (1867) L. R. 1 C. P. 274; 2 C. P. 311.

Lords—Lord Atkinson and Lord Wrenbury—in *Fairman* v. *Perpetual Investment Building Society* (1), and in the speech of Lord Hailsham L.C. in *Robert Addie & Sons* (*Collieries*) *Ld.* v. *Dumbreck* (2). In the first of those cases both Lord Atkinson and Lord Wrenbury appear to be saying that a licensor is liable in respect of a trap of which he "ought to know." But since it was held by the majority of the House that there was no trap (a trap is a hidden danger and this was a patent danger) it was immaterial to the decision whether the defendant company was an invitor or licensor: in neither event could it be liable. These passages must therefore be considered obiter dicta.

In a recent decision of the Irish Supreme Court, *Boylan* v. *Dublin Corporation* (3), Black J. put the matter compactly in the following words: "The plaintiff's status—whether "that of a licensee or that of invitee—was not in issue, and "I am at a loss to understand how a pronouncement on a "matter that is not in issue can be part of the ratio decidendi, "or anything but an obiter dictum." The same observation in our view applies to a passage to the same effect in Lord Hailsham's opinion in *Robert Addie & Sons* (*Collieries*) *Ld.* v. *Dumbreck*, where Lord Hailsham said (4): "In the case of "persons who are not there by invitation, but who are by "leave and licence, express or implied, the duty is much "less stringent," (that is to say, less stringent than the duty towards an invitee) "the occupier has no duty to ensure "that the premises are safe, but he is bound not to create "a trap or to allow a concealed danger to exist upon the said "premises, which is not apparent to the visitor, but which is "known—or ought to be known—to the occupier." In this case again the observation was unnecessary to the decision, since the plaintiff was neither an invitee nor a licensee but a trespasser, and failed for that reason. The Court of Appeal in *Coates* v. *Rawtenstall Corporation* (5), and the majority of text-book writers, have treated these words as used per incuriam; but on any view they are used obiter.

An ingenious argument was, however, put forward by counsel for the plaintiff which, if sound, would incidentally justify the language of Lords Atkinson, Wrenbury and Hailsham. It was suggested that the formula "danger of

(1) [1923] A. C. 74.
(2) [1929] A. C. 358.
(3) [1949] I. R. 60, 77.
(4) [1929] A. C. 358, 365.
(5) 157 L. T. 415.

which he ought to know" was used in different senses in relation to invitors and licensors respectively, and that its use in relation to licensors could be defended when this distinction was grasped. Invitors may be liable though wholly ignorant of the facts constituting the danger, provided that they ought to have known of those facts. A licensor will not be liable unless he knows the facts which objectively constitute the danger: but (so the argument ran), if any reasonable person would know that those facts did constitute a danger, he cannot be heard to say that he did not know that they did. On this view, and in this sense of the words, a licensor who knows the facts which actually constitute the danger ought in addition to know that those facts do constitute a danger—in cases at least where it is obvious that they do so.

In putting forward this contention counsel for the plaintiff prayed in aid *Baker* v. *Bethnal Green Borough Council* (the air raid shelter case) (1). In that case the point is raised, described as attractive, but left open in the following passage from the judgment of Lord Greene M.R. (2): "Counsel "for the respondent put forward what I must confess at first "sight appears to me to be a very attractive explanation "of that difficulty. What he said was that, if a licensor "knows of the existence of what in fact is a trap or a hidden "danger, that is sufficient, because he cannot be heard to "say that, although he knew the physical facts which "constituted the danger from a purely objective point of view, "the fact that it was a danger did not occur to his mind. "In other words, that when the phrase 'or ought to have "'known' was used, it was directed to that view of the "position, and refers, not to the physical objective facts, "but to the circumstance that those facts constitute a danger. "That appears to me to be a very attractive view, but, much "though I should like to do so, I do not find it necessary to "consider whether it is correct or not."

Having regard to the view we take of this limb of the plaintiff's argument, we too can afford to leave this point undecided. For we think that in the sense properly attributable to the words, the defendants "actually knew of the "danger" and that the plaintiff does not need to rely on the word, "ought." Before seeking to define this sense, it may be well to glance at the authorities. A great many were cited to us, but on this branch of the case we need only

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(1) 43 L. G. R. 75.

(2) Ibid. 80.

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refer to the two which are most nearly in point. The first is *Ellis* v. *Fulham Borough Council* (1). In that case a local authority provided a recreation park with a paddling pool for children, and sand. A notice was exhibited prohibiting users from taking bottles, tins and the like into the pool, owing to the risk of cut feet. The pool was raked every morning to clear it of any broken glass, etc., which might be there, but the rake used was quite ineffective for this purpose, as it only stroked the surface of the submerged sand. The plaintiff, a small boy, while paddling in the pool had his foot cut by broken glass embedded in the sand. The plaintiff, who was held to be a licensee, was held entitled to recover. The local authority did not know that glass was buried in the sand, but they knew of the possibility of its being there, ergo they were held to have that "actual knowledge of the "danger" which fixes a licensor with liability. Greer L.J. said (2): "It does not seem to me to matter that the "corporation officials did not know that the actual piece "of glass was there; the question is whether they knew "that there was a danger to children that they ought to "provide against?" Actual knowledge of a potential danger would therefore seem to suffice.

The other case is *Coates* v. *Rawtenstall Corporation* (3). There again the local authority were occupiers of a recreation ground, which in this case contained a chute down which children could slide. The infant plaintiff was injured by a chain placed across the lower end of the chute by another boy in mischief. The chain was normally so placed on Sundays when the chute was out of use. On weekdays, when the chute was in use, the chains were padlocked to a pole by the attendant, partly, as he said, because, if loose, the children might tamper with them, e.g., by doing what they had seen him do on Sundays, namely, place the chain across the chute. In this case the chains were insecurely attached to the pole. It was held (1.) that the plaintiff was a licensee, and (2.) that the danger of the chains, if loose, being used by mischievous boys in the manner in which they were in the event used constituted a danger actually known to the attendant (and therefore to the local authority), not merely a danger of which he and it ought to have known. Greer L.J. said (4): "The danger created" (I think he means capable

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(1) [1938] 1 K. B. 212.
(2) Ibid. 225.
(3) 157 L. T. 415.
(4) Ibid. 416.

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of being created) "by a mischievous boy using this chain "was a danger known to the ground attendant, the servant "of the defendants; it was not merely a danger of which he "ought to have known but a danger of which he did in fact "know." Slesser L.J. said (1): "The evidence, therefore, "showed: first, knowledge on the part of the defendants, "by their agent, that these chains were likely to be put to "the dangerous use to which this chain was put, by boys "in mischief; secondly, that this chain was not properly "secured by the ground attendant; and, thirdly, that this "particular chain was put round the chute by a boy in "mischief." The Lord Justice is clearly holding that to know so much is to have "actual knowledge of the danger." Both Lords Justices held that there was a breach of the defendants' duty as licensors towards the infant licensee. Scott L.J. agreed.

These two authorities are binding on this court. They seem to decide: (1.) that to have "actual knowledge of the "danger" the defendant or his servants need not know of the actual presence on the premises at the time of the accident of the physical object which, in the result, causes the injury. It is enough if such an object has been there in the past and a similar object may be there again if no sufficient precautions have been taken to prevent its presence: *Ellis* v. *Fulham Borough Council* (2). Also (2.) (and more relevant to the present case) that it is sufficient if the defendant knows (*a*) that there is present a physical object capable of being put in a dangerous condition; (*b*) by the action of third persons; (*c*) who are quite likely to act in such a way as to put it in a dangerous condition, having regard to their past behaviour or inherent qualities: *Coates* v. *Rawtenstall Corporation* (3).

We feel it impossible to distinguish the present case materially from *Coates* v. *Rawtenstall Corporation* (3). The three conditions (*a*), (*b*) and (*c*) are satisfied in the present case. In both cases a simple precaution was omitted which would have thwarted or rendered innocuous the possible action of the third persons. The only difference which can be suggested is that the accident in *Coates'* case (3) took the precise form which the defendants could have anticipated: the attendant had fastened the chain across the chute on Sundays in the presence of the children. He had put the idea into their heads, and the danger " of which the defendants " (by their servant) " knew," was that of the children doing likewise; whereas in the present case no one on behalf of the defendants had seen the children pull the grille forward so as to threaten the safety of anyone emerging from the convenience.

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(1) 157 L. T. 417.

(2) [1938] 1 K. B. 212.

(3) 157 L. T. 415.

We do not think this difference crucial. What the borough council by their servants knew in this case (taking such evidence of their servants as the county court judge accepted, and ignoring that part of it which he rejected) was: (1.) that the children had persistently (for three or four years there had been complaints of this) tampered with the grille, in particular by swinging on it, and that this had " worried " the witness O'Connell a lot; (2.) that the lavatory attendant had seen them swinging on the convenience gate that morning within half an hour of the accident and had seen them swinging on the grid, also that morning; (3.) that it does not require any force to pull a grid; and (4.) that the swinging of the children could have " moved the grid forward a bit."

Given this knowledge on the part of the borough council's servants, it would seem that, on the principle on which *Coates* v. *Rawtenstall Corporation* (1) proceeded, the council " actually " knew of the danger." The only distinction between the cases is that in the *Ellis* (2) and *Coates* (1) cases the dangerous condition materialized in a casualty in the precise way contemplated by the defendants, e.g., in *Ellis*' case (2) they had issued a warning notice specifying the sort of casualty likely to occur, namely, " cut feet " to a paddler; and cut feet to a paddler resulted. In *Coates*' case (1) it had materialized also in the way contemplated, namely, in injuries to one child due to a chain being stretched across the chute by another. Whereas in the present case, while the dangerous condition (namely, an easily-sliding grille habitually tampered with by children, movable by them and capable in certain positions of inflicting serious injury) was liable to injure someone—a child or someone else—in some way, yet the council could not and did not foresee the precise manner in which this dangerous condition would translate itself into an actual casualty. In our view this distinction is not a material difference; in all three cases the council " actually knew of the danger "; and the plaintiff is entitled to succeed even though a mere licensee.

(1) 157 L. T. 415.

(2) [1938] 1 K. B. 212.

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This conclusion, if well founded, would absolve us from considering the other issue, namely, whether the plaintiff was indeed a mere licensee or an invitee. If we are wrong, and the plaintiff was an invitee, he would in this character a fortiori be entitled to recover. But, as the issue has been argued before us at some length, we think that we should set out briefly the grounds of our conclusion that the plaintiff was a licensee only. The general principles on which persons coming on the premises of an occupier with his consent are classified as invitees and licensees, respectively, are easy to formulate, but not always easy to apply. They are somewhat over-simplified in the formula in Salmond's Law of Tort 10th ed., at p. 476 justly commended by MacKinnon L.J.: "The invitor says 'I ask you to enter upon my business.' The licensor says 'I permit you to enter on your own business'."

Succinct and vivid as is this formula, it might suggest that the visitor is an invitee only if the business on which he comes is exclusively that of the occupier. This is, of course, not what is meant. It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest; e.g., a shopper has an interest to buy and a shopkeeper an interest to sell. It is sometimes said that the interest must be pecuniary or at least "material." This certainly does not mean that a visitor who is not required to pay and does not pay is necessarily excluded from the class of invitees: e.g., many shops encourage customers to enter and inspect their wares without any obligation to buy. No doubt this practice pays in a purely pecuniary sense in the long run and is tolerated for that reason: compare *Stowell* v. *Railway Executive* (1). But it is not clear that a "common "interest" for this purpose may not exist where no pecuniary gain, immediate or remote, whatever is aimed at. In *Weigall* v. *Westminster Hospital* (2), the mother of a patient (it is true a paying patient) at the hospital in the course of visiting him slipped on a mat placed on a polished floor and suffered injuries. She was held to be entitled to recover qua invitee. It is not clear that the result might not have been the same if her son had not been a paying patient. In a Canadian case, *Nickell* v. *City of Windsor* (3), the same status was attributed to a person who, having entered a public library

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(1) [1949] 2 K. B. 519.

(2) 52 T. L. R. 301.

(3) [1927] 1 D. L. R. 379.

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(presumably without paying), was injured in leaving it by slipping on an ice-covered step.

The observations obiter of Lord Greene M.R. in the air-raid shelter case—*Baker* v. *Bethnal Green Borough Council* (1) carry the matter a step further. He said (1): " The first " question is whether or not the relationship of the appellants " to the respondent's husband was that of invitor and invitee. " It seems to me that there are serious arguments in favour " of the view that that was the true relationship. The " appellants were fulfilling a public duty. Upon the due " performance of that duty their reputation as servants of " the public depended. In order to fulfil that duty they " furnished themselves with premises thought to be suitable, " and they threw them open to such members of the public " as might desire to use them. In those circumstances it " seems to me that there are serious grounds for saying that " the case bears no resemblance to the case where, for social " reasons or reasons of that kind, one person allows, or I will " use the word ' invites ' (but I use it here in a non-technical " sense) somebody to come upon his premises; and it may " well be that such a case as the present is to be distinguished " from *Ellis* v. *Fulham Borough Council* (2), which was a " case of a public park provided by a local authority. Greer L.J. " appears to have taken the view that even in that case the " relationship was that of invitor and invitee, although he " did not so hold as a matter of judgment. The other two " members of the court, Slesser L.J. and MacKinnon L.J., " took the view that the relationship was that of licensor " and licensee. Here I do not find it necessary to express " any concluded opinion upon the question, and I will assume " that the true legal relationship was that of licensor and " licensee."

It is true that these are obiter dicta; but they relate to a case in which no pecuniary interest—immediate or long-term—on the part of the occupier existed. If the matter were free from other authority, and if the observations just cited were part of the ratio decidendi of the case, we should find ourselves impelled to the conclusion that the defendants, who were from motives of civic duty and in pursuance of their public functions providing an essential sanitary service, were invitors. In both cases the public authority had the power, but was under no legal compulsion, to provide the facilities

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(1) 43 L. G. R. 75.

(2) [1938] 1 K. B. 212.

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in question. Our difficulty in arriving at such a conclusion arises from such cases as *Ellis* v. *Fulham Borough Council* (1), *Coates* v. *Rawtenstall Corporation* (2), and *Glasgow Corporation* v. *Taylor* (3), in all of which it was held that persons entering a public park or recreation ground were mere licensees. If, however, we are wrong in this view, the result we have arrived at on the basis of the inferior duty owed to a licensee is confirmed and reinforced.

For these reasons we think that the appeal should be allowed.

Appeal allowed.

Solicitors: *Victor Mishcon & Co.; The Town Clerk, Lambeth.*

(1) [1938] 1 K. B. 212.
(2) 157 L. T. 415.
(3) [1922] 1 A. C. 44.

C. G. M.

C. C. A.

1950
May 15, 22.

Lord Goddard C.J., Humphreys, Stable, Cassels, Hallett, Morris and Parker JJ.

REX *v.* TAYLOR

Criminal law—Bigamy—Defence—Absence of husband or wife for seven years—" Second marriage "—Defence available in case of any subsequent marriage—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 57.

On an indictment for bigamy the " second marriage " within the meaning of s. 57 of the Offences against the Person Act, 1861, with which the court is concerned is that which is the subject of the indictment, and if on the hearing of that charge it is proved that the lawful spouse had been absent for seven years, that defence is available to the person charged notwithstanding that person has previously committed bigamy with some other person or persons.

Rex v. *Treanor* (1939) 27 Cr. App. R. 35, disapproved.

If, in the opinion of a full Court of Criminal Appeal, it appears that in a previous decision of the court the law has been either misapplied or misunderstood and that, as the result of a judge's having followed that decision, a person has been sentenced and imprisoned for an offence, it is the bounden duty of the court to reconsider its own earlier decision with a view to seeing whether that person was properly convicted.

APPEAL against convictions.

In 1925 the appellant, John William Taylor, was married to his wife, Alice Julie Taylor, who was still alive at the time of the present proceedings but who had not been seen by the appellant since 1927 and was not known by him to be alive. In 1927 the appellant went through a form of marriage with another woman, and in 1942, having left that woman, he married a third. In 1944 he was charged with bigamy in respect of this last ceremony and was acquitted by reason of the fact that in those proceedings it was alleged that he had committed bigamy during the lifetime of the woman whom he had married in 1942, who was at that time believed by the prosecution to be his lawful wife. In 1945 he was charged at the Central Criminal Court in respect of his alleged bigamy in 1927 and was again acquitted because the prosecution could not at that time establish that his wife had been alive at the time of that marriage.

In 1946 he went through a ceremony of marriage with one Lilian Smithers and in 1948 with one Olive Briggs. In respect of those two ceremonies he was charged with bigamy at the Central Criminal Court in March, 1949, when he pleaded guilty to both charges and received a sentence of four years imprisonment. He applied for leave to appeal against that sentence. The application came before a court of three judges, who raised the question why, since the appellant had not seen or heard of his wife since 1927, he had not availed himself of the defence of seven years' absence afforded by the proviso to s. 57 of the Offences Against the Person Act, 1861 (1).

The appellant's counsel informed the court that, in view of the decision in *Rex* v. *Treanor* (2) that the defence of absence for seven years was only available in the case of a second marriage and was not available on any subsequent occasion, he had not felt justified in raising it. The court intimated that in their view the decision in *Rex* v. *Treanor* (1) should receive further consideration by a full court, and accordingly gave leave to the appellant to appeal against the convictions.

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(1) Offences against the Person Act, 1861, s. 57: "Whosoever, "being married shall marry any "other person during the life "time of the former husband or "wife, whether the second mar-"riage shall have taken place in "England, or Ireland or elsewhere "shall be guilty of felony . . . . "Provided that nothing in this "section contained shall extend "to any second marriage con-"tracted elsewhere than in "England and Ireland by any "other than a subject of Her "Majesty, or to any person "marrying a second time whose "husband or wife shall have been "continually absent from such "person for the space of seven "years then last past, and shall "not have been known by such "person to be living within that "time, or shall extend to any "person who, at the time of such "second marriage, shall have "been divorced from the bond of "the first marriage . . . ."

(2) (1939) 27 Cr. App. R. 35.

Maurice Havers for the appellant. The decision in *Rex* v. *Treanor* (1) should be reconsidered by the court. Bigamy was first made a felony by the statute 1 James I c. 11, which provided in s. 1 that "if any person or persons within his "Majesty's Dominions of England and Wales, being married, ". . . . do . . . . marry any person or persons, the former "husband or wife being alive; that then every such offence "shall be felony." Section 2 contained a proviso in the following terms: "Provided always, that this Act nor any- "thing therein contained, shall extend to any person or persons "whose husband or wife . . . . shall absent him or herself "the one from the other by the space of seven years together, "in any parts within His Majesty's Dominions, the one of "them not knowing the other to be living within that time." The words in s. 1 "marry any person or persons" must, it is submitted, cover the case of more than one bigamous marriage, and the words of the proviso must equally relate to any bigamous marriage and not merely the first. The provisions of the Act of 1604 were re-enacted by 9 Geo. 4, c. 31, s. 22, in terms which are similar to those of s. 57 of the Offences Against the Person Act, 1861. The words "marrying a second time" in the proviso to s. 57 should be read as meaning a second or any subsequent time. If "second marriage" were confined to meaning the first bigamous marriage it would follow that a man who had committed two bigamies could not be prosecuted for the second one. In *Rex* v. *Treanor* (1) Lord Hewart C.J. said "the proviso means exactly what it says— "neither more nor less—and when the expression 'marrying "'a second time' is used, it means a second time and is not "to be artificially expanded into meaning a second or "subsequent time." It is submitted that that is not a correct statement of the law and that the defence afforded by the proviso was available to the appellant in answer to the offences with which he was charged.

(1) 27 Cr. App. R. 35,

Elam for the prosecution. The only question raised by the appeal is whether the defence under s. 57 is available more than once. In some cases it is the policy of the law to allow a particular defence to apply once and once only, as for instance under s. 2 of the Criminal Law Amendment Act, 1922; and it is submitted that the decision in *Rex* v. *Treanor* (1) rightly held that s. 57 only applies in the case of a first bigamy.

Lord Goddard C.J. stated the facts and the circumstances leading up to the appeal, and continued:—I desire to say a word about the reconsideration of a case by this court. The Court of Appeal in civil matters usually considers itself bound by its own decisions or by decisions of a court of co-ordinate jurisdiction. For instance, it considers itself bound by its own decisions and by those of the Exchequer Chamber; and, as is well known, the House of Lords also always considers itself bound by its own decisions. In civil matters this is essential in order to preserve the rule of stare decisis.

This court, however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present, and in this particular instance the full court of seven judges is unanimously of opinion that the decision in *Rex* v. *Treanor* (1) was wrong for a reason which I will indicate in a moment.

The offence of bigamy, so far as it is a temporal offence, was created in the first place by the statute 1 James I, c. 11, which the industry of Mr. Havers has discovered for us. It is there provided: "if any person or persons within His "Majesty's Dominions of England and Wales, being married, "or which hereafter shall marry, do at any time after the "end of the session of this present Parliament, marry any "person or persons, the former husband or wife being alive; "that then every such offence shall be felony."

(1) 27 Cr. App. R. 35.

It is clear from that section that what is aimed at there is what I may call polygamy—not merely bigamy, a second marriage, but any number of marriages, because the words are "shall marry any person or persons." Then, in s. 2, there is a proviso: "Provided always, that this Act, nor any thing "therein contained, shall extend to any person or persons "whose husband or wife shall be continually remaining beyond "the seas by the space of seven years together, or whose "husband or wife shall absent him or herself the one from "the other by the space of seven years together, in any parts "within His Majesty's Dominions, the one of them not knowing "the other to be living within that time."

It is obvious that under that statute the defence of absence for seven years without knowledge of the spouse being alive was a defence however many times the ceremony of marriage had been gone through. It is not, I think, necessary to read the next statute, the Offences against the Person Act, 1828, because s. 57 of the Offences against the Person Act, 1861, with which we are immediately concerned, is, in substance, in the same form. That section is in these terms: [his Lordship read s. 57 and continued]:

The words "second marriage" at the beginning of the section must clearly be given the same meaning as is given to them when they appear later on in the proviso, and consequently, if the words "the second marriage" in the first part of the section, the enacting part, which makes bigamy a felony, are limited to the second ceremony and are held not to apply to a third and subsequent ceremonies, a man could only be convicted of bigamy if he had married twice and not if he had gone through a third, fourth or fifth subsequent ceremony. In *Rex* v. *Treanor* (1) the court put a construction on the words "second marriage" from which this court sees no reason to differ from one point of view; but in our opinion the court there did not proceed to give logical effect to their decision. It was there said by the court: "the proviso means "precisely what it says—neither more nor less—and when "the expression 'marrying a second time' is used, it means "'a second time'." Then the court went on to say that the words were not to be artificially expanded into meaning a second or subsequent time.

The short point on which this court can decide this case—and it seems to me to be the true way of deciding it—is this:—

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(1) 27 Cr. App. R. 35.

When a court is dealing with a count charging bigamy, it is concerned with the allegation that on a particular day a man went through a ceremony of marriage when his lawful wife was alive. It is therefore concerned with two ceremonies of marriage and no more, the lawful marriage and the ceremony, whether bigamous or polygamous, in respect of which the charge is made. Directly the bigamous or polygamous later ceremony is proved, it is open to the defendant to show that at the time of that ceremony—which is the only "second "marriage" with which the court is concerned—he had not heard of his wife for seven years. It does not seem to this court that it is then open to the prosecution to say: "there "have been other ceremonies of marriage in between." The offence which is charged is that of going through the particular marriage on the particular day when the lawful wife was alive. Therefore the defendant has a defence if it is shown that, at the time when he went through the marriage which is charged against him as a felony, he had not seen his wife for seven years. Any other construction would lead to very astonishing results. It is quite enough to say that, while we do not differ from the opinion the court in *Rex* v. *Treanor* (1) that the words "second "marriage" must be strictly construed, the second marriage which has to be considered is the second marriage charged in the indictment and no other. Therefore, for those reasons, as I have said, although we do not differ from the construction put on s. 57 in *Rex* v. *Treanor* (1), we differ from the result which the court held to follow from that construction.

Accordingly, we are of opinion in this case that, although the appellant might have been charged with other offences, he could not properly be convicted of the offence of bigamy, and therefore these convictions must be quashed.

Appeal allowed

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

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(1) 27 Cr. App. R. 35.

P. B. D.

C. A.

1950
May 16, 17.

Evershed M.R., and Jenkins L.J

DENNY *v.* SUPPLIES & TRANSPORT CO. LD., AND OTHERS.

[Plaint No. F6A]

Negligence—Unloading by wharfingers' of barge loaded by stevedores—Defective loading—Wharfingers' employee injured in unloading—Liability of stevedores.

The plaintiff who was employed by wharfingers was injured while unloading timber from a barge which had been loaded by stevedores from a steamship in the Port of London and towed to the wharfingers' wharf for unloading on to lorries. The plaintiff had at the start of the unloading drawn attention to the bad loading and suggested that it was a case for payment of danger money. He brought proceedings against both wharfingers and stevedores. The county court judge dismissed the action against the former but awarded damages against the latter, holding that the plaintiff's injury was the natural and probable result of the bad loading and that there was no novus actus interveniens. On appeal by the stevedores,

Held, (1.) that the transhipment of timber from the steamship to the wharf was one continuous process so that the plaintiff was "the neighbour" of the stevedores within Lord Atkin's definition in *Donoghue* v. *Stevenson* [1932] A. C. 562, 580, and a person, therefore, to whom they could be liable for negligence; (2.) that, even though the bad loading had been ascertained by inspection at the start of the unloading, there was no practical alternative to going on with the unloading, and therefore neither knowledge of the bad loading nor inspection operated to break the chain of causation so as to relieve the stevedores from their liability to the plaintiff. *Farr* v. *Butters Brothers & Co.* [1932] 2 K. B. 606 distinguished. *Horton* v. *London Graving Dock Co.* [1950] 1 K. B. 421 applied.

APPEAL from Southwark county court.

The second defendants, Scruttons Ld., were stevedores. Early in 1949 they were engaged in unloading timber from the steamship *Dieppe* in the Port of London into barges, which were then towed to a wharf belonging to the first defendants, who unloaded the timber on to lorries. On January 30, 1949, the stevedores' barge *Rustic* was loaded from the ship, and on February 1, 1949, it was being unloaded into lorries. The plaintiff was employed by the wharfingers as a dock labourer and was engaged with another man in unloading the barge. He complained to the wharf superintendent that the barge had been so badly loaded that he should be paid danger money as it was unsafe.

The wharf superintendent said that they would come to some agreement when they got down further. Early in the afternoon the plaintiff was injured as a result of the timber's shifting. He brought an action against both the wharfingers and the stevedores for damages for negligence and breach of reg. 41 of the Dock Regulations, 1934.

The county court judge dismissed the action against the wharfingers but awarded 100*l*. damages (including special damage) against the stevedores, holding that the plaintiff's injury was the natural and probable result of the bad stowing and that there had been no novus actus interveniens. The stevedores appealed. By consent the appeal was heard by two judges only.

D. P. Croom-Johnson for the appellants. The stevedores were under no duty to the wharfingers or the plaintiff as their employee because both knew of the bad loading. The duty could only be owed to a person ignorant of the defect. Even if knowledge was not a bar, there was no evidence to support the county court judge's finding of fact that the stevedores had no reason to think that any danger arising from the bad loading of the barge would be removed on inspection by the wharfingers. Further, he applied the wrong test in view of *Donoghue* v. *Stevenson* (1). It was not in terms argued in the court below that the stevedores owed no duty because of knowledge, but that they owed no duty because of the intermediate inspection.

[Evershed M.R. Could the wharfingers have taken any steps to remove the danger before the unloading began?]

No, but they could have refused to unload. In *Donoghue* v. *Stevenson* (1) it was laid down that the duty was owed to a neighbour. The question "who, then, is my neighbour" at law, was answered by Lord Atkin (2). The test, then, is whether the plaintiff was the stevedores' "neighbour." [He referred to *Grant* v. *Australian Knitting Mills Ld.* (3).] The present case closely resembles *Farr* v. *Butters, Brothers & Co.* (4), where a crane was supplied by manufacturers in parts. Before it was put together, a defect in some part was found. In spite of that it was put together and used. It was held that the manufacturers were under no liability for the resulting accident. For liability to be established there must be negligence combined with a duty to the person injured.

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(1) [1932] A. C. 562.
(2) Ibid. 580.
(3) [1936] A. C. 85, 102.
(4) [1932] 2 K. B. 606.

[EVERSHED M.R. The present case is distinguishable because the work of unloading had to go on.]

When the difficulty of unloading was discovered, that was the time for the wharfingers to send the barge back unloaded. [He referred to *Elliott* v. *Hall* (1) and *Caledonian Railway Co.*. v. *Mulholland* (2).] The latter case rested on the view that there was ample opportunity for inspection. Here the stevedores can be under no liability for what happened after the inspection. Knowledge of the risk must be conclusive in breaking the chain of causation. He referred also to *Oliver* v. *Saddler & Co.* (3), *Otto* v. *Bolton* (4), and *Horton* v. *London Graving Dock Co.* (5).]

I. F. Reuben for the plaintiff. It was not here open to the stevedores to set up the plea of knowledge.

[EVERSHED M.R. The judge found as a fact that they had reason to think that there would be inspection.]

There was no evidence on which he could find that inspection would reveal imminent danger. That was not in the mind of the plaintiff when he asked for danger money, and he was content with the answer that that could be considered later.

The only practical thing that the wharfingers could do was to unload. The stevedores who loaded the barge must have contemplated that it would be unloaded. The loader cannot be free of responsibility in those circumstances. Knowledge cannot affect the matter when there is no reasonable way of avoiding the risk after it is discovered. The wharfingers, as unloaders, were legal neighbours within the meaning of *Donoghue* v. *Stevenson* (6). There were abundant facts to support the county court judge's findings in favour of the plaintiff.

M. R. Nicholas for the wharfingers. The wharfingers are really only concerned to support the county court judge's decision in regard to costs. There were two vital findings by the county court judge: (1.) that there was no alternative to unloading the barge in spite of the risk unless the wharfingers refused to unload, which was not a thing to be contemplated by any reasonable person; (2.) that there was no novus actus interveniens and that the plaintiff was therefore clearly

(1) (1885) 15 Q. B. D. 315.
(2) [1898] A. C. 216.
(3) [1929] A. C. 584.
(4) [1936] 2 K. B. 46.
(5) [1950] 1 K. B. 421.
(6) [1932] A. C. 562, 580.

the neighbour of the stevedores: the chain of causation was not broken; *Horton* v. *London Graving Dock Co.* (1).

Croom-Johnson replied.

EVERSHED M.R. This appeal turns on the application to the facts of this case of the principles which found classic expression in Lord Atkin's speech in *Donoghue* v. *Stevenson* (2). [His Lordship stated the facts and continued]: The county court judge's findings were quite clear and precise as regards the relevant facts. He found "that the loading was "very badly done." The stevedores, indeed, cut a poor figure in the court below, for the judge went on to say that the witnesses called for them "were reluctant and unconvincing "witnesses." Against that somewhat unpromising background this appeal is brought, and Mr. Croom-Johnson has not found it possible to challenge the judge's uncomplimentary observations about the performance and testimony of the stevedores. Nor is any claim made by the stevedores against the plaintiff on the ground that he was himself negligent and contributed thereby to the accident, or on the principle of volenti non fit injuria. As regards the latter point, Mr. Croom-Johnson urged that the stevedores could not know the precise circumstances of the accident, as it took place after they had ceased to have control of the barge. That may be so, but that fact cannot, to my mind, affect the question whether they owed a duty to the plaintiff. If they did, it is their misfortune that they were unable to see what happened when the accident occurred by reason of their failure in duty. But I must not be taken to say that, if they had set up a defence based on contributory negligence, or on the ground of volenti non fit injuria, it could have succeeded.

I would make two general observations in regard to the facts of this case. First (and to my mind this is the vital matter), the part played by the stevedores in unloading the *Dieppe* into the *Rustic* was part of one series of transactions, one continuous process, namely, the transhipment of the timber from the ship to the land. Second, although the plaintiff was painfully aware that the timber was, as the judge said, very badly loaded, I think that Mr. Reuben and Mr. Nicholas are entitled to say that it is going too far to suggest that the loading, inept though it was, was of such a character that to anybody of experience the danger was not only certain but imminent.

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(1) [1950] 1 K. B. 421.

(2) [1932] A. C. 562.

The matter has played a little part in the argument, and I therefore refer briefly to what the plaintiff said. When he saw the way in which the timber was stacked, he felt (to use his own words) that "it was not too safe." He therefore complained to the wharf superintendent and asked for danger money on that ground. To this the wharf superintendent, who also, I take it, was a man of experience, replied: "We'll "come to some agreement when we get down further." The plaintiff accepted that view. As a fact, the extra danger money of twopence per ton was subsequently paid. I refer to that evidence to show that it is going far too far to suggest that any experienced person looking at the barge *Rustic* must have known that the stacking was of such a character that the danger was not only certain, but imminent.

The relevant part of the judge's judgment is as follows: "I find as a fact that the second defendants had no reason "to apprehend that before unloading the danger created by "this mode of stowing the timber would be removed by inspec-"tion on behalf of the first defendants. The second defendants "(probably because they were not well served by their "employees) appear to have been satisfied with the mode of "stowing. Mr. Robinson—he was the foreman under whom "the plaintiff was working—said that he did not know of "a safe way of unloading timber which had been badly stowed "and that, if he had known of one, he would have adopted it. "I accept this evidence. I think that the practical choice "lay between refusing to unload the barge and unloading it "in the normal way. He chose the latter." Then the judge said in conclusion: "In my judgment the plaintiff's injury "was the natural and probable result of the bad stowing by "the second defendants. There was no novus actus "interveniens."

The statement that the stevedores had no reason to apprehend that before unloading the danger would be removed by inspection caused me at first a little difficulty, because danger is not, prima facie, removed by the mere operation of gazing upon it. But I think that the judge meant that the stevedores, who must be taken to have intended the natural consequences of their actions, could not be held to suppose that, if inspection showed that the timber was ill-stacked and dangerous, there would be a practical opportunity of altering the procedure to be pursued. That was a view of the facts which the judge was well entitled to form. Mr. Croom-Johnson impeached that particular finding and said that it was unsupported by any evidence. I cannot agree. What was, in the circumstances of this case, the natural and reasonable course of events was a matter for the judge to find as a fact: and, on the ample material which he had, he was fully justified in his conclusion. As a matter, therefore, of general principle, it seems to me that the conclusion which the judge reached was not only fully justified on the material before him, but correct in principle and logic. There was no practical alternative to the course of conduct adopted, so that there was, in the learned judge's phrase, no novus actus interveniens or (in the phrase of Greer L.J., in one of the cases I will mention presently) no break in the chain which began with the unskilful loading of the *Rustic* by the stevedores.

That being my conclusion on the facts, I will turn briefly to the law and see whether I have been right in what I assumed it to be. I cannot refrain from again saying that the stevedores have cut a somewhat sorry figure in the case. The case now sought to be established by them bears no kind of resemblance to the case which they set up when the matter first came to trial. They asserted and attempted in evidence to prove that the loading of the barge had been all that skilful stevedores could desire. That contention was rejected in no uncertain terms. They now turn round and say that the loading of the barge was done with such obvious lack of skill that to any experienced person the danger was clear and that no one could reasonably be expected to go on the barge and unload it. That, though it does not, of course, commend the stevedores' case, might be an answer to the plaintiff's claim, if their point in law were right, and the knowledge and opportunity of inspection did break the chain.

I return to *Donoghue* v. *Stevenson* (1), and to the well-known speech of Lord Atkin. It is to be observed that the characteristic of English law has been not so much to provide an exhaustive statement of the law of negligence but rather to consider each set of facts as it comes before the court and then to answer the question whether the person charged is liable for the damage suffered. And in answering it the court has seen that the result is in accordance with principles gradually established as from time to time cases have come

(1) [1932] A. C. 562.

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before the court. Mere ineptitude, mere failure to be careful, does not in English law create liability to a person injured. The original statement which was the foundation of Lord Atkin's subsequent analysis came from a judgment of Lord Esher in *Heaven* v. *Pender* (1). Lord Atkin observed that it was too wide as it stood and would extend to create liability towards persons far too remote from the original careless act. In those circumstances, the famous statement was made that for this purpose the law must see who is your neighbour, for you are liable only to that limited class of persons. The answer given in *Donoghue* v. *Stevenson* (2) is this: "The answer " seems to be persons who are so closely and directly affected " by my act that I ought reasonably to have them in con" templation as being so affected when I am directing my mind " to the acts or omissions which are called " negligence. Later, after a careful survey of many of the cases, the noble Lord asks and answers negatively the question whether the liability depends upon an invitation, actual or assumed, by the defendant to use the chattel in question. He says (3): " I do not find the decisions expressed to be based upon this " ground, but rather upon the knowledge that the plaintiff " in the course of the contemplated use of the chattel would " use it." Taking those two passages together, I think that they plainly support the view of the judge here that the test is whether what occurred was within the reasonable contemplation of the person doing the act and whether the person injured was sufficiently closely affected by the act.

In the course of his citation of authorities, Lord Atkin referred to *Caledonian Railway Co.* v. *Mulholland* (4), where the conclusion was against the claimant. Lord Atkin says that it was there held that the first railway company were under no duty to the injured workman. " There was ample " opportunity for inspection by the second railway company. " The relations were not proximate."

Mr. Croom-Johnson founded his argument on that passage, and on *Farr* v. *Butters Brothers & Co.* (5), a case which came before this court shortly after the decision in *Donoghue* v. *Stevenson* (6). It was to the effect that when there is knowledge and an opportunity for inspection on behalf of the injured person or his employers, or either of those two things,

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(1) (1883) 11 Q. B. D. 503, 509.

(2) [1932] A. C. 580.

(3) Ibid. 585.

(4) [1898] A. C. 216.

(5) [1932] 2 K. B. 606.

(6) [1932] A. C. 562.

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the chain is necessarily broken. The proposition that the mere fact of knowledge or of an opportunity for inspection would break the chain without regard to the consequence of knowledge or inspection appears to me to be illogical; and unless compelled to do so I should be reluctant to put such an artificial limitation on the sensible principle founded on the passages from Lord Atkin's speech which I have already read. I think that, when the cases are examined, no such artificial limitation exists. In *Donoghue* v. *Stevenson* (1) itself the point did not arise because there was certainly no knowledge and certainly no opportunity for inspection.

In *Farr* v. *Butters Brothers & Co.* (2) the facts were these:—The defendant company supplied a crane in sections to builders. Manifestly it was in the contemplation of the parties to that transaction that the builders should themselves erect the crane and put it together. Farr, the plaintiff's husband, was a highly-skilled crane erector employed by the builders for that purpose. In the course of the erection he discovered that certain wheels and parts of the crane were defective. That discovery indicated to his mind that, unless those defects were remedied, the crane would not be safe to use. There was then no obligation on the builders or Farr to use the crane until the defects had been remedied; nor could it be contemplated that, given that discovery, it would be used. Farr thought fit to use it, but the crane broke by reason of the defects and he was killed. It was held that, as there was knowledge of the defect and it could not have been contemplated in these circumstances that the crane would be used, the chain of causation was broken.

In my view, Mr. Croom-Johnson is wrong when he says that this case is on all fours with *Farr* v. *Butters Brothers & Co.* (2). It is of the essence of this case, as emerges quite plainly from the findings of the judge which I have read, that, notwithstanding the knowledge and the opportunity foı inspection, such as they were, the unloading would, nevertheless, go on in the ordinary way. There was indeed, as the judge pointed out, no practical alternative. Therefore the knowledge and the opportunity for inspection in this case lacked the essential significance that they had in *Farr* v. *Butters Brothers & Co.* (2).

I think it unnecessary to go through the other cases, but I would like by way of conclusion to allude briefly to a case

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(1) [1932] A. C. 562.

(2) [1932] 2 K. B. 606.

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which has come before the court in the present year: *Horton* v. *London Graving Dock Co.* (1). There the plaintiff was injured by a fall occasioned by unsafe planking on which he had to walk for the purpose of doing his work in a ship. That staging or planking had been provided by the dock company, who were contractors in charge of the operations on the ship. The plaintiff was not in their service but in the service of a sub-contractor. The main ground of the decision in favour of the plaintiff was that, since at the time of the accident the defendant company were in control and in charge of the ship, they were liable on the principles of *Indermaur* v. *Dames* (2). But the case was alternatively based on *Donoghue* v. *Stevenson* (3). As I read the argument, the emphasis seemed rather to be put upon the point that volenti non fit injuria applied, because the insecurity of the staging was perfectly obvious to the plaintiff. As my brother Jenkins said, there it was plain for all to see. There is, however, no suggestion in the judgments of Singleton and Jenkins L.JJ., that the facts of knowledge and opportunity for inspection, without regard to their significance, affected the class of persons to whom the duty extended so as to exclude the plaintiff: and for the reason which, I think, emerges from the judgments that, although the danger was there apprehended, it was quite plain and must have been contemplated by the defendants that the work must still go on in the ordinary course. If that is a true analysis, as I think it is, it seems to me that *Horton* v. *London Graving Dock Co.* (1) forms a better guide for the decision of this case than *Farr* v. *Butters Brothers & Co.* (4). It seems to me to illustrate the point that knowledge or opportunity for inspection, per se and without regard to any consequences they may have in the circumstances, cannot be conclusive against the plaintiff.

The result, in my opinion, is that the judge was right to hold that the chain of causation was not broken, and that there existed here the necessary proximate relationship between the plaintiff and the stevedores. The knowledge and the chance of inspection which the plaintiff and his employers, the wharfingers, had was not such as to prevent the injuries suffered by the plaintiff from being, in the eyes of the law, attributable to the bad loading of the stevedores, or as to place

(1) [1950] 1 K. B. 421.

(2) (1866) L. R. 1. C. P. 274.

(3) [1932] A. C. 562.

(4) [1932] 2 K. B. 606.

the plaintiff outside the category of neighbour. I think that this appeal should be dismissed.

JENKINS L.J. I agree entirely with the judgment just delivered.

Appeal dismissed.

Solicitors: *Gardiner & Co.; Bryan O'Connor & Co.; L. Bingham & Co.*

H. C. G.

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Dec. 12, 13, 14, 15, 21.

Devlin J.

Shipping—Charterparty—Ice encountered in approaches to port—Port safe or unsafe.

On January 10, 1947, the charterers of a steamship ordered her to load a cargo of flour for Hamburg. Clause 2 of the charterparty provided: "the vessel to be employed in lawful trades for "the carriage of lawful merchandize only between good and safe "ports or places where she can safely lie always afloat (or "safe aground where vessels of similar size and draft "customarily load and discharge aground in safety) within the "following limits: United Kingdom, Continent, Elbe Brest "limits, excluding Ireland, Shetland or Orkneys . . . ." Clause 15 provided "the vessel not to be ordered to nor bound to enter ". . . . any ice-bound place or any place where lights, lightships, "marks and buoys are or are likely to be withdrawn by reason of "ice on the vessel's arrival or where there is risk that ordinarily "the vessel will not be able on account of ice to reach the place "or to get out after having completed loading or discharging. "The vessel not to be obliged to force ice. If on account of ice "the master considers it dangerous to remain at the loading or "discharging place for fear of the vessel being frozen in and/or "damaged, he has liberty to sail to a convenient open place and "await the charterers fresh instructions. Unforeseen detention "through any of the above causes to be for the charterers' "account."

The vessel sailed from London on January 12, arriving on January 14 at Hamburg, where she loaded a cargo of timber for London, leaving again on January 22. On the voyage to and from Hamburg she was damaged by ice in the River Elbe. Her owners accordingly claimed damages against the charterers.

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Held, (1.) that a port was not a "safe port" within the meaning of the charterparty unless a ship could reach it and safely return from it, and that it was immaterial where the danger was located: the charterers did not guarantee that the most direct or any particular route was safe, but the voyage ordered by them must be one which an ordinarily prudent and skilful master could find a way of making in safety. *Palace Shipping Co., Ld.* v. *Gans Steamship Line* [1916] 1 K. B. 138 applied.

(2.) That at the material time Hamburg was not a safe port within the meaning of that definition; that the risk of danger was an extraordinary one; and that the effect of cl. 15 of the charterparty was not to entitle the charterers to insist that the vessel should go there.

(3.) That the action of the charterers in ordering the ship to Hamburg as an unsafe port constituted a breach of the contract. *Hall Brothers Steamship Co., Ld.* v. *R. and W. Paul, Ld.* (1914) 19 Com. Cas. 384 and *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (1932) 38 Com. Cas. 79 followed.

(4.) That in the circumstances the act of the master in obeying the order of the charterers, having been done in the ordinary cause of things, was not a novus actus interveniens.

The owners were accordingly entitled to the damages claimed.

SPECIAL CASE stated by an arbitrator.

By a time charter in the Baltime form dated December 2, 1946, G. W. Grace & Co., Ld., as owners, let a steamship, the *Sussex Oak*, to the General Steam Navigation Co., Ld., as charterers. The vessel entered on the charter service on December 12, 1946. On January 10, 1947, the charterers ordered her to load a cargo of flour for Hamburg. The cargo was loaded, the steamer sailed for Hamburg on January 12, and she arrived there on January 14. At Hamburg she loaded a cargo of timber for London under a voyage charter made between the charterers and the Board of Trade, and on January 22 she left Hamburg for London. On the voyage to and from Hamburg the steamer was damaged by ice in the River Elbe. In respect of that damage the owners claimed an indemnity under cl. 9 of the charterparty, and the claim was referred to arbitration as provided.

The arbitrator found, inter alia, (1.) that the period from January 5, 1947, until the middle of March, 1947, was one of exceptional severity and that a great deal of ice formed in the River Elbe and its tributaries; (2.) that the dangers of navigation in the river at all material times were not ordinary navigational dangers but were extraordinary both in character and degree, and that decisions regarding them were not ordinary navigational decisions; (3.) that the charterers ordered the vessels to sail into danger, and did so knowing of it; (4.) that their orders were complied with and resulted in damage to the vessel due to the anticipated risk; and (5.) that, at the beginning of the voyages to and from Hamburg, no circumstances existed which could indicate to the master of the *Sussex Oak* or to experienced river pilots that an ice-block was to be anticipated, either where it in fact occurred or at any other place.

The parties asked the arbitrator to make an interim award on the question of liability only, and he accordingly made his award in the form of a special case, leaving for the decision of the court the following questions: whether, on the true construction of the charterparty and on the facts which the arbitrator found, the charterers were liable to pay damages in respect of the loss which the owners sustained through the damage to the *Sussex Oak* on her voyages to and from Hamburg, or through her having been redelivered after them without that damage having been repaired, or through the damage to the vessel on one only of the voyages, or through her having been redelivered after it without the damage having been repaired; or whether they were liable to indemnify the owners in respect of the loss which they sustained through all or part of the damage to the *Sussex Oak*.

By cl. 2 of the charterparty the vessel was to be employed in lawful trades between good and safe ports between the Elbe, United Kingdom and Brest. By cl. 7 the vessel was to be redelivered on the expiration of the charter in the same good order as when delivered to the charterers, fair wear and tear excepted. By cl. 9 the master was to be under the orders of the charterers as regards employment, agency or other arrangements, and the charterers were to indemnify the owners against all consequences or liabilities arising from the master's signing bills of lading or other documents or otherwise complying with such orders.

The owners contended that they were entitled to be indemnified by the charterers under cl. 9; that at the material time Hamburg was not a safe port within the meaning of cl. 2; and that the damage had resulted from the vessel's being ordered by the charterers to go there and was a consequence of the master's complying with the order. They further contended that there had been a breach of cl. 7 because the steamer was not redelivered in good order, fair wear and tear excepted.

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The charterers contended that at all material times the master had full responsibility, and that if in his discretion he had thought it unsafe to proceed through the ice he need not have done so.

Roy Wilson for the charterers. As to the claim for breach of cl. 2 of the charterparty, the charterers' submissions may be summarized in the form of six propositions. First, the question whether a port or place is safe or unsafe properly relates only to the construction or contours of the port or its approaches: *The Alhambra* (1); *Reynolds* v. *Tomlinson* (2); *Robert Dollar Co.* v. *Blood, Holman & Co., Ld.* (3); *Limerick Steamship Company Ld.* v. *W. H. Stott and Co. Ld.* (4); *Axel Brostrom and Son* v. *Louis Dreyfus and Co.* (5); *Lensen Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.* (6); *Johnston* v. *Saxon Queen Steamship Company* (7); or to political dangers: *Ogden* v. *Grahan* (8) and *The Teutonia* (9); or to military dangers: *Palace Shipping Company, Ld.* v. *Gans Steamship Line* (10). It never relates to marine dangers. Although in the *Palace Shipping Co.* case (10) Sankey J. expressed the view that the dangers likely to be incurred on a voyage to a port may be taken into account when considering whether or not a port is safe, this principle should not be extended to marine dangers on the voyage which (unlike military dangers) the master is in a position and has a duty to counter. If the principle were extended to marine dangers on the voyage it would be difficult to know where a line is to be drawn. For example, would the probability of encountering violent storms or icebergs render the port of destination unsafe?

Secondly, the expression safe port in this charterparty cannot in any event have reference to ice dangers, which are the subject of a special clause which must be taken as intended to provide an exclusive remedy in relation to ice. It is significant that in *Limerick Steamship Company Ld.* v. *W. H. Stott and Co. Ld.* (4), where the charterparty was in analogous terms, the shipowners, quite rightly, did not rely on cl. 2 in relation to the port of Abo, although they put reliance on it in relation to the port of Manchester.

(1) [1881] 6 P. D. 68.

(2) [1896] 1 Q. B. 586.

(3) (1920) 4 Ll. L. R. 343.

(4) [1921] 1 K. B. 568.

(5) (1932) 38 Com. Cas. 79.

(6) (1934) 50 Ll. L. R. 62; (1935) 52 Ll. L. R. 141.

(7) (1913) 108 L. T. 564.

(8) (1861) 1 B. & S. 773.

(9) (1872) L. R. 4 P. C. 171.

(10) [1916] 1 K. B. 138.

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Thirdly, even if ice dangers on the voyage can be taken into account, on the actual facts found there is no evidence on which the port can properly be held to have been unsafe. In so far as weather can make a port unsafe, the time at which the question—safe or unsafe—has to be decided is the time at which the decision has to be made whether or not to enter the port or its approaches. The question is not decided retrospectively: *Johnston* v. *Saxon Queen Steamship Co* (1). In this case, at the time when the master made or ought to have made his decision (at the latest on arrival at Brunsbüttel) the facts were that there was an ice-breaker service, and that, although there was some risk of encountering ice-blocks, that risk was known to the pilots and accepted by the master. In these circumstances the port was not unsafe in the reasonable meaning of that term: safety does not mean complete absence of risk.

Fourthly, if the port was at any time unsafe, it was purely a temporary condition, and there was no breach of clause 2: see Scrutton on Charterparties (15th ed.) pp. 125-6. The most that can be said is that the Elbe was unsafe in the absence of ice-breaker assistance; but it has been found as a fact that ice-breakers were operating in the river, and it would appear that there would have been little delay in arranging such assistance for the passage up river.

Fifthly, in any event, the remedy available to the owners was to refuse to go or continue on the voyage. The cases in which damages have been awarded for breach of the safe-port or analogous provisions have been few and special. The true principle is that such damages are only recoverable where the master has no opportunity of avoiding the damage incurred: *Limerick Steamship Company Ld.* v. *W. H. Stott and Co. Ld.* (2); or where expense is incurred in order to avoid unsafe conditions: *Hall Brothers Steamship Co., Ld.* v. *R. and W. Paul, Ld.* (3); *Axel Brostrom and Son* v. *Louis Dreyfus and Co.* (4). This suggested principle, which is consistent with *Samuel West, Ld.* v. *Wright's (Colchester) Ld.* (5) and *The Pass of Leny* (6), provides a better criterion than the distinction suggested in Scrutton on Charterparties (15th ed.) p. 122, between unsafe ports and unsafe berths; or the distinction apparently suggested by

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(1) 108 L. T. 564.
(2) [1921] 1 K. B. 568.
(3) (1914) 19 Com. Cas. 384.
(4) 38 Com. Cas. 79.
(5) (1935) 40 Com. Cas. 186.
(6) (1936) 54 Ll. L. R. 288.

Greer L.J. in *Lensen Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.* (1) between time charters and voyage charters. Here the master elected to take such risk as there was, and it would be wrong to allow the resultant damage to fall on the charterers.

Finally, if the port or place was unsafe, the damage sustained did not flow from the charterers' ordering the ship to go there. The master, in appropriate circumstances, is entitled to disobey such an order, since in every matter affecting the navigation or safety of the vessel his discretion is always final. Counsel referred to *Larrinaga Steamship Company, Ld.* v. *Rex* (2); *Weir* v. *Union Steamship Company* (3); *Limerick Steamship Company Ld.* v. *W. H. Stott and Co Ld.* (4); *Portsmouth Steamship Company Ld.* v. *Liverpool and Glasgow Salvage Association* (5). Here the master's decision to continue the voyage was, to use the words of Lord Wright in *Yorkshire Dale Steamship Company Ld.* v. *Minister of War Transport* (6) " the real or efficient cause " of the damage and not simply one of a number of co-operating causes. It broke the chain of causation which is said to have started from the giving of the sailing orders. A fortiori, the master's decision to start on the return voyage, taken in the light of his full knowledge of the risks, was the sole cause of the damage sustained on that voyage. It is further submitted that the owners were not entitled to recover the amount of damage under either cl. 9 or cl. 7 of the charterparty.

A. W. Roskill K.C. and *Eckersley* for the shipowners. Dangers likely to be encountered on the voyage to a port are material to the consideration whether or not the port is safe: *Palace Shipping Company, Ld.* v. *Gans Steamship Line* (7). The question whether or not a port is safe is in each case one of fact and degree. Accordingly the arbitrator's findings are conclusive against the charterers unless, on the facts found, the arbitrator has erred in law: *Bornholm* (*Owners*) v. *Exporthleb Moscow* (8). It is submitted that each of the charterers' six propositions is unsound. The proposition that marine dangers do not render a port unsafe is unsupported by authority, and is difficult to reconcile with *Johnston* v. *Saxon Queen Steamship Company* (9). There is no logical or commercial reason for distinguishing, in this connexion, between marine dangers and any other kind of danger. The charterers submit next that cl. 2 of the charterparty does not apply to ice dangers, the exclusive remedy for such dangers being contained in cl. 15. That contention is erroneous as a matter of construction. The arbitrator has found here that the risk involved in the vessel's going to and from Hamburg was exceptional or extraordinary. Therefore, if the charterers' construction be sound, they could insist on sending the vessel to an unsafe port. Thirdly, the charterers submit that on the facts found Hamburg was not unsafe. The basis of this contention seems to be that the material moment for deciding whether or not a port is safe is that at which the master decides to proceed. This basis is erroneous: see *Ogden* v. *Graham* (1). [They referred also to Scrutton on Charterparties (15th ed.) 122.]

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(1) 50 Ll. L. R. 62; 52 Ll. L. R. 141.
(2) [1945] A. C. 246.
(3) [1900] A. C. 525.
(4) (1921) 1 K.B. 568
(5) (1929) 34 Ll. L. R. 459.
(6) [1942] A. C. 691, 706.
(7) [1916] 1 K. B. 138, 141.
(8) (1937) 58 Ll. L. R. 59.
(9) 108 L. T. 564.

In any event when the master on January 14 and 22 decided to go to and from Hamburg respectively the port was, on the facts found, unsafe. The charterers submit fourthly that Hamburg was only temporarily unsafe. With regard to this, the question whether an obstacle is permanent or temporary is one of fact and degree. The character of the obstacle in relation to the circumstances of each particular case must be considered: *Nelson* v. *Dahl* (2); *Dahl* v. *Nelson* (3). The shipowners submit that the ice dangers in the Elbe presented more than a temporary obstacle in the circumstances of this case, and that the arbitrator has so found. The charterers' fifth contention is that the shipowners' only remedy was to refuse to go to Hamburg and that they cannot claim damages. The answer to that is that by the charterparty the ship was to be employed by the charterers only between good and safe ports. When charterers order a ship to a particular port, they give orders under the charterparty. If the port is, or proves to be, unsafe, the charterers are in breach of charterparty, and for that breach the shipowners are entitled to claim damages. The charterers rely upon *Samuel West, Ld.* v. *Wright's (Colchester) Ld.* (4) and *The Pass of Leny* (5). The present case, however, relates to a time charterparty, and in *Lensen Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.* (6) (also a time charterparty case) Greer L.J. distinguished *Samuel West, Ld.* v. *Wrights (Colchester) Ld.* (4) as not relating to a time charterparty. It is

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(1) 1 B. & S. 773.

(2) (1879) 12 Ch. D. 568, 593, 598, 602.

(3) 6 App. Cas. 38, 54, 59.

(4) 40 Com. Cas. 186.

(5) 54 Ll. L. R. 288.

(6) 50 Ll. L. R. 62; 52 Ll. L. R. 141.

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difficult to advance a satisfactory explanation for the distinction drawn by Greer L.J., but it is submitted that the dictum is binding. If it be not binding, it is submitted that the observations of Branson J. in *Samuel West, Ld.* v. *Wrights (Colchester) Ld.* (1) were obiter and should not be followed. In that case there was held to be no sufficient evidence that the vessel had been ordered to the berth at which the damage was alleged to have been sustained. Accordingly the observations of Branson J. were unnecessary to the decision. In the *Pass of Leny* (2), as reported, the shipowners' claim was dismissed on the grounds that the voyage charterer did not expressly or impliedly warrant the berth to be safe. But that part of the shipowners' claim which was based upon breach of charterparty by the charterers in sending the vessel to the berth does not appear to have been determined. The decision, as reported, is unsatisfactory, and that view is supported by the note to Scrutton on Charterparties (15th ed.) p. 122.

The charterers' sixth contention was that damage did not flow from compliance with the charterers' orders, but was caused by the intervening navigational decision of the master. Upon the facts found this contention is not open to the charterers. The master had no opportunity on the voyage up or down the Elbe to exercise his discretion. He was caught in a trap.

[Counsel referred to *Yorkshire Dale Steamship Co. Ld.* v. *Minister of War Transport* (3) and *A/B Karlshamns Oljefabriker* v. *Monarch Steamship Co., Ld.* (4).]

It is also submitted on the facts found (1.) that the charterers are obliged to indemnify the shipowners under cl. 9 of the charterparty, and (2.) that the shipowners are entitled to recover under cl. 7 of the charterparty.

Wilson replied.

Cur. adv. vult.

[Dec. 21. DEVLIN J. read the following judgment in which he stated the facts, referred to the charterparty and the findings of the arbitrator, and continued :] Slightly different considerations apply to the two voyages, and I take the voyage up to Hamburg first. Counsel for the charterers has formulated six points of law for determination by the court, and I shall take them in the order in which they were advanced.

(1) 40 Com. Cas. 192.
(2) 54 Ll. L. R. 288.
(3) [1942] A. C. 691, 706.
(4) (1949) 82 Ll. L. R. 137.

He submits, first, that a port is not unsafe because ice dangers are encountered on the way to it. In my judgment, there is a breach of cl. 2 if the vessel is employed upon a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage which he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety. In the present case the only route to Hamburg was by the Elbe, and the arbitrator has found that this approach was unsafe by reason of ice.

The view of the law which I have expressed is supported by the authority of *Palace Shipping Company, Ld.* v. *Gans Steamship Line* (1), and, so far as it rests on that authority, is not challenged by the charterers. But it is contended that the principle which Sankey J. there applied to military or naval dangers likely to be encountered on the voyage does not apply to marine dangers, for these the master is appointed to deal with. I cannot see any distinction in principle here. The reasoning, if it is sound, should apply with equal force to marine dangers within the area of a port; but dangers from wind and weather can make a port unsafe: see *Johnston* v. *Saxon Queen Steamship Company* (2). It is true that a master is better equipped than a landsman to deal with marine perils, and doubtless better equipped to deal with marine perils than with naval perils. That is a consideration which is relevant as a matter of fact when the degree of danger is being determined. Likewise, the ordinary sea perils, such as heavy weather or storm, will not usually last long enough to make the port or the route to it more than temporarily unsafe. That gives rise to another point which I consider below; but I see no reason why dangers which can be classified as marine—and I suppose that that includes ice—should be disregarded altogether in determining the safety of a port or voyage.

It is next contended that cl. 2 does not apply at all, because its general provisions are, in relation to ice dangers, ousted by the specific provisions of cl. 15, which gives an exclusive remedy for such dangers. Cl. 15 provides that the vessel is not to be ordered to any ice-bound place, or where there is a

(1) [1916] 1 K. B. 138.

(2) 108 L. T. 564.

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risk that ordinarily the vessel will not be able, on account of ice, to reach the place or to get out. On this clause the arbitrator has found in the charterers' favour. The wide provisions of cl. 2, it is argued, must not be extended to prohibit what is impliedly permitted (since it is not expressly prohibited) by the specific provisions of cl. 15.

In a very recent case, *Royal Greek Government* v. *Minister of Transport* (1), I pointed out what seemed to me to be some of the general objections to this type of argument in relation to charterparties, and I shall not repeat them here. In this particular case the argument can, I think, be sufficiently tested by considering what, if it is sound, is impliedly permitted by cl. 15. In the finding of the arbitrator that there was no risk that ordinarily the vessel would not be able, on account of ice, to reach Hamburg, the significant word is " ordinarily." The case as a whole makes it abundantly clear that in January, 1947, there was such a risk ; and it is also clear, I think, from what he says in para. 9 (*a*) about the exceptional severity of the period that the arbitrator regarded the risk as extraordinary. The alleged implication would therefore result in the charterers' having the right to insist that the ship should go to a port which ex hypothesi was unsafe because the danger that made it unsafe was extraordinary instead of ordinary. I cannot think that such a result was intended. Commercial men like to make special and detailed provision for matters which they think of special importance. That, in my judgment, is all that cl. 15 is doing.

Thirdly, it is contended that the condition of unsafety was temporary only. It is the law that the danger must be operative for a period which, having regard to the nature of the adventure and of the contract, would involve inordinate delay : see, in particular, *S.S. Knutsford Ld.* v. *Tillmanns & Co.* (2). This raises primarily a question of fact. The arbitrator, in para. 9, noted the charterers' contention that the obstacle was temporary only, and must be taken by his finding to have decided it against them. The period of the ice danger compared with the duration of the charterparty and the shortness of the voyage to Hamburg clearly justifies this conclusion. Indeed, it is not, I think, directly challenged ; but it is said that the arbitrator acted on a wrong basis. The question of safety, it is argued, must be determined at the time when the master has to make his decision to proceed. It must therefore be deter-

(1) (1950) 83 Ll. L. R. 228.

(2) [1908] A. C. 406.

mined on the estimate of the position which would be reached at that time by a well-informed and experienced master; and a decision based on such an estimate will not be affected by the fact that, in the light of after-events, it is proved to be erroneous. There is in the special case no finding that on January 14, when the *Sussex Oak* was in the Elbe, the ice dangers were then considered likely to be more than temporary. Indeed, there is no finding that at that point of time the port or its approaches were then considered to be unsafe. The only evidence that there is points, it is said, the other way, for it consists of the views of the river pilots who thought it safe to proceed.

This leads to the fourth contention of the charterers, that there was no evidence to support the finding that the port was unsafe; and I can conveniently consider these two contentions together. The argument is, I think, mistaken. I am not here discussing the decision of the master not to proceed, but the fact that the master, whether advisedly or not, did proceed and that thereby the ship was damaged. If I were concerned with a decision and its validity, it might well be that the test propounded would be the right one. *Johnston* v. *Saxon Queen Steamship Company* (1), on which Mr. Wilson relied for this purpose, suggests that view. In this it is an illustration of a principle of wide application in commercial affairs, best expounded in the well-known passage from the judgment of Scrutton J. in *Embiricos* v. *Reid (Sydney) & Co.* (2): "Commercial men "must not be asked to wait till the end of a long delay to find "out from what in fact happens whether they are bound by "a contract or not. They must be entitled to act on reasonable "commercial probabilities at the time when they are called "upon to make up their minds."

That principle is at least as old as the conception of constructive total loss, but it is one to be applied with discrimination. It involves the court in proceeding on an erroneous estimate of the facts and probabilities for, if the estimate is not erroneous, no point arises. That course can be taken only when it serves the important commercial purpose indicated by Scrutton L.J. When a claim for damages is being considered, the event has happened and need no longer be forecast. The right to damages depends on a wrong done and an injury actually sustained, not on someone's estimate of whether a wrong is likely to be done or an injury likely to be sustained. A master is not to be deprived of his remedy because, in ignorance of the danger, he entered a port which well-informed men might erroneously have pronounced to be safe ; nor is he to be given damages if he sustains injury in conditions which fall short of the danger-point merely because well-informed men might have erroneously pronounced his entry into the port to be foolhardy. In my judgment, the arbitrator, being concerned only with a claim for damages for injury to the ship, rightly proceeded on the view which he formed of the true facts.

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(1) 108 L. T. 564.

(2) [1914] 3 K. B. 45, 54.

The fifth and sixth contentions of the charterers may be taken together. The fifth is that the only result which can flow from an order to sail to an unsafe port is that the master is at liberty to refuse to go. The order being one which the master is not bound to obey, there can be no remedy for him in damages if he chooses to obey it. The sixth contention is that the damage was caused solely by the voluntary act of the master in taking the navigational decision to proceed up river.

The first of these points gives rise to a little difficulty, for the position on the authorities is not entirely clear. In *Limerick Steamship Company Ld.* v. *W. H. Stott and Co. Ld.* (1) Scrutton L.J. reserved his opinion on the point.

In *Samuel West, Ld.* v. *Wrights* (*Colchester*) *Ld.* (2) the ship alleged that she had sustained damage at an unsafe berth to which she had been ordered by the consignees of the bill of lading (incorporating the terms of a voyage charterparty). Branson J. dismissed the claim, saying: "It seems to "me that the true position is that the charterparty gives "the consignee a right to order the vessel alongside any "particular wharf, but if the vessel does not know what it is "going to find there, it can make inquiry, and if it finds that it "cannot safely deliver by going there, then it is excused from obeying that order. That is all, in my view, that is intended by those words of the charterparty." In *The Pass of Leny* (3), a similar claim under a voyage charterparty, but based on breach of warranty, was dismissed by Bucknill J. on the ground that the charterer did not expressly or impliedly warrant that the berth was safe.

There have been cases in which the ship has been given, by way of damages, the expenses of lightering or of tug assistance in order to enter a port otherwise unsafe : see *Hall Brothers Steamship Co. Ld.* v. *R. and W. Paul, Ld.* (4) ; *Axel Brostrom and*

(1) [1921] 2 K. B. 613, 621.

(2) 40 Com. Cas. 186, 192.

(3) 54 Ll. L. R. 288.

(4) 19 Com. Cas. 384.

Son v. *Louis Dreyfus and Co.* (1). Mr. Wilson seeks to distinguish these on the ground that in them the master was avoiding the risk instead of incurring it. In the former case, I note that it was unsuccessfully argued that the master, by accepting the order, was estopped from alleging that the port was unsafe. In *Limerick Steamship Company Ld.* v. *W. H. Stott and Co. Ld.* (2) on a point which did not reach the Court of Appeal, Bailhache J. awarded as damages the expenses of cutting the masts in order that the vessel might safely leave Manchester. Mr. Wilson has distinguished this on the ground that, when it comes to leaving the port, as distinct from proceeding to it, the master has no choice.

While Mr. Wilson's main strength lies in the dictum of Branson J., his main difficulty is created by *Lensen Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.* (3). In that case the ship, which was under time charter, was ordered to a berth which, although neither party knew it, was in fact unsafe, and she thereby sustained damage and had to be repaired. The charterers appear to have deducted hire during the period of repair; and the owners claimed the balance of hire, or alternatively, damages, and a declaration that the charterers were liable to pay the cost of the repairs. The arbitrator awarded in their favour. MacKinnon J. upheld the award, holding that "it was a breach of the charterparty to "send her to that berth." Clause 1 of the charterparty was, so far as material, in the same terms as cl. 2 of the charterparty which I am considering. The Court of Appeal also (by a majority, Maugham L.J. dissenting) upheld the award. Greer L.J. held that, although cl. 1 referred to ports and not expressly to berths, it extended, on its proper construction, or alternatively by implication, to berths within the port. He therefore held "that the ship was employed at a loading berth "which was outside the limits in which the owners agreed that "she should be employed." Slesser L.J. disagreed with the construction, but accepted the implication. The court does not appear to have dealt with the claim for damages as such. Greer L.J. held that the breach of cl. 1 disentitled the charterers from relying on the off-hire clause. He also relied on cl. 8 (the indemnity clause) and cl. 12, which made the charterers responsible for loss or damage caused to the steamer by goods being loaded contrary to the terms of the charterparty. The

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(1) 38 Com. Cas. 79.

(2) [1921] 1 K. B. 568, 575.

(3) 50 Ll. L. R. 62, 66; 52 Ll. L. R. 141.

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effect of the case was therefore that the owners recovered for damage to the ship.

Samuel West, Ld. v. *Wrights* (*Colchester*) *Ld.* (1) was decided between the hearing of *Lensen Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.* (2) before MacKinnon J. and its hearing before the Court of Appeal. It was cited in the Court of Appeal and distinguished by Greer L.J. (2) on the ground that it did not relate to a time charter; nor did the contract contain a term that the master should obey the orders of the charterers as to the employment of the ship. With the greatest deference, I find this distinction difficult to follow. It implies that, whereas under a voyage charterparty the master is not bound to obey the order of the charterer to go to a port or berth outside the contractual limits, under a time charterparty he is. I cannot think that the clause in the time charterparty which puts the master under the orders of the charterer as regards employment is to be construed as compelling him to obey orders which the charterer has no power to give. It is perhaps sufficient for my determination of the present case that it concerns a time charterparty and is therefore governed by *Lensen Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.* (3) and not by *Samuel West, Ld.* v. *Wrights* (*Colchester*) *Ld.* (1). Counsel for the owners, while not able to offer any explanation of Greer L.J.'s dictum which satisfied him, contended that I am bound by it. If I am, I of course accept it ; but, even if I am not, I should reach the same conclusion, for I should respectfully disagree (for reasons which I shall give below) with the dictum of Branson J.

Before I leave the authorities I may refer to *Temple Steamship Company, Ld.* v. *v/o Sovfracht* (4.) By the curious form of charter which the House of Lords considered in that case, the charterer ordered the vessel to Garston, to which he had no power to order her, and she went to Garston, where she was requisitioned. The House treated the order as a breach of the charterparty and upheld an award of damages based on the difference between a free and a requisitioned ship.

As the authorities are not clear and conclusive on the point which I have to determine, I shall state my own view of it. I think that it is necessary first to determine whether the giving of the order constitutes a breach of contract. Ex hypothesi, the order has no contractual force and is therefore of no greater validity than an order given to the ship by a stranger. The charterers in this case do not expressly warrant that their orders will be within their powers, and it might be argued that it is for the recipient to determine for himself whether they are binding on him or not. In some types of contract, that may be so; but in this case counsel for the charterers concedes that the charterparty, either on its true construction or by implication, forbids the giving by the charterers of orders outside their powers, and accordingly that the giving of an order to sail to an unsafe port is a breach of the charterparty. If this concession had not been made, counsel would plainly have found it difficult to explain *Hall Brothers Steamship Co., Ld.* v. *R. & W. Paul, Ld.* (1), *Axel Brostrom and Son* v. *Louis Dreyfus and Co.* (2), and the judgments of Bailhache J. in *Limerick Steamship Company Ld.* v. *W. H. Stott and Co. Ld.* (3) and of MacKinnon J. in *Lensen Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.* (4), which all proceeded on the basis that the order to go to an unsafe port or berth was a breach of the charterparty. The same result might be reached, irrespective of the giving of any order, by construing cl. 2 as a warranty that the ship would not be employed otherwise than between good and safe ports; but, in view of the charterers' concession, I need not consider this.

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(1) 40 Com. Cas. 186.

(2) 52 Ll. L. R. 148.

(3) 50 Ll. L. R. 62.

(4) (1945) 79 Ll. L. R. 1.

Once the breach of contract is established, it seems to me to follow that, subject to the ordinary rule of remoteness, damages must result. There may be cases in which the charterer is innocent of any intention to break the contract and where the master deliberately decides to enter a port which he knows to be unsafe. Roche J., on a rather similar point in *Portsmouth Steamship Company Ld.* v. *Liverpool and Glasgow Salvage Association* (5) indicated that the master should not follow the instructions of the charterer if they led to obvious danger. But these factors go to the question of causation only. The giving of an order does not necessarily cause the damage that flows from an act done in pursuance of it. Put more specifically, the decision of the master to obey the order may in certain circumstances amount to a novus actus interveniens. But, in the circumstances of this case, the arbitrator clearly regarded the acts of the master as done in the ordinary course of things and not

(1) 19 Com. Cas. 384.

(2) 38 Com. Cas. 79.

(3) [1921] 1 K. B. 568, 575.

(4) 50 Ll. L. R. 62; 52 Ll. L. R. 141.

(5) 34 Ll. L. R. 459.

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blameworthy: he was doing what any intelligent observer, knowing exactly how he was circumstanced, would have expected him to do. I take these phrases from the speech of Lord Wright in *Summers* v. *Salford Corporation* (1). The facts set out in the special case fully justify this conclusion.

This disposes of the damage done to the ship on her way to Hamburg. The damage done to the ship on her way down the Elbe was, on the arbitrator's view as a matter of causation, the result of her leaving an unsafe port. A safe port means "a port "to which a ship can safely get and from which she can safely "return": per Bailhache J. in *Limerick Steamship Company Ld.* v. *W. H. Stott and Co. Ld.* (2). The point that the master might have avoided the damage by using an icebreaker is, in my view, concluded against the charterers on the facts found.

Since, after consideration, I have reached a clear conclusion about the breach of cl. 2 and its consequences, I need not further consider two other grounds on which it was sought to sustain the award and which were based on the indemnity clause (cl. 9) and the re-delivery clause (cl. 7). I answer in the affirmative the first part of the first question stated in para. 21 of the case, and that answer is sufficient to uphold the award made in para. 18.

Judgment for the shipowners.

Solicitors: *Sinclair, Roche and Temperley*; *Keene, Marsland and Co.*

(1) [1943] A. C. 283, 296. (2) [1921] 1 K. B. 568, 575.

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Lord Goddard C.J., Morris and Finnemore JJ.

PRIESTMAN COLLIERIES LD. *v.* NORTHERN DISTRICT VALUATION BOARD AND ANOTHER.

Mines and minerals—Coal—Nationalization—Compensation—Sale of mining timber — Method of valuation — "Open market" — Coal Industry Nationalisation Act, 1946 (9 *&* 10 *Geo.* 6, *c*, 59), *s.* 13, *sub-s.* 4; *Control of Timber* (*No.* 35) (*Mining Timber Prices*) *Order*, 1944 (*St. R. & O.* 1944, *No.* 920); *Control of Timber* (*No.* 32) (*General Provisions*) *Order* 1944, (*St. R. & O.* 1944, *No.* 917).

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By s. 10 of the Coal Industry (Nationalisation) Act, 1946, provision is made for the payment of compensation in respect of coal mining undertakings ("transferred interests") transferred to the National Coal Board. Section 13 provides for the valuation of transferred interests, and by s. 13, sub-s. 4 for that purpose the value of an undertaking "shall be taken to be the amount which "it might have been expected to realize if this Act had not been "passed and it had been sold on the primary vesting date in the "open market by a willing seller to a willing buyer . . . ." By sub-s. 5, on the assumed sale ". . . . regard shall be had to all "relevant circumstances" including (*a*)"the state of things in "which the transferred interests subsisted at the date of their "vesting in the board."

The expression "open market" in s. 13, sub-s. 4 does not contemplate a purely hypothetical market to be regarded as exempt from restrictions imposed by law. The inquiry directed is what the sale of the undertaking would have realized on January 1, 1947. The requirements that any notion of compulsory sale must be ignored, and that the seller must be deemed to have done as well as a willing seller might reasonably be expected to do on that date do not mean that he should be regarded as a person not bound by law. Any restriction imposed by law on him or on any willing buyer must be taken into account. The assumed sale, though a notional one, must therefore be taken as subject to the conditions under which willing buyers and sellers could legitimately have operated on January 1, 1947; and the requirement in s. 13, sub-s. 5 that regard should be had to all relevant circumstances shows that what is contemplated is a sale in the actual market, rebus sic stantibus.

On the transfer of a coal mine undertaking to the National Coal Board under the Act of 1946, it became necessary to value, among other things, its stocks of mining timber. On January 1, 1947, the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, was in force, which prescribed maximum prices for the sale of mining timber. The maximum prices fixed with regard to imported timber were substantially lower than otherwise where the sale was to the owner of a coal mine in Great Britain buying the timber for use in that mine. It was agreed between the parties that the sale in question would be at the site of the undertaking and that the purchaser who would offer the best price would be the one who intended using the purchased articles at that site.

Held, (1.) that the notional sale must be taken as subject to the prices fixed by the order of 1944; and (2.) that, in view of the above-mentioned agreement between the parties as to the circumstances of the sale, the valuation fell to be determined according to the lower scale of prices fixed by the order for the case where the sale was to the mine owner for use in his mine.

SPECIAL CASE stated by a referee under reg. 40 of the Coal Industry Nationalisation (Valuation of Compensation Units) Regulations, 1947.

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By notice dated June 30, 1949, the respondents, the Northern District Valuation Board, established by s. 12 of the Coal Industry Nationalisation Act, 1946, fixed the amount of the draft valuation of the undertaking of the claimants, Priestman Collieries Ld., at a certain figure. The claimants, while not taking objection to the greater part of the valuation, contended that the value of their stocks of mining timber had not been ascertained on the principles laid down by the Act of 1946 and was not correct.

They were heard on that part of the draft valuation on September 16, 1949, when their contentions were rejected by the valuation board, who confirmed the above valuation, which included 4,862*l.* 10*s.* 10*d.*, in respect of the timber.

The claimants gave notice that they wished to have the valuation reviewed by the statutory panel of referees. The matter was heard on January 17, 1950, by the referee who decided in favour of the claimants that the value to be attributed to the timber was 8,125*l.* 16*s.* 3*d.*, but stated this special case for the opinion of the court.

The matters set out by the referee in the special case may be summarized as follows:—By s. 13, sub-s. 4 of the Act of 1946 it was the duty of the valuation board to fix the value of the mining timber on the basis of the amount which it might have been expected to realize if the Act had not been passed and it had been sold on the primary vesting date, January 1, 1947, in the open market by a willing seller to a willing buyer, no allowance being made on account of the compulsory character of the vesting. On the date in question the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944 (St.R. & O., 1944, No. 920), was in force. That Order prescribed prices for the sale of imported mining timber and maximum prices for the sale of home-grown timber. The prices fixed with regard to imported timber were substantially lower where the sale was to the owner of a coal mine in Great Britain buying the timber for use in that mine than where the sale was to any other person.

It was agreed that, if that order applied to the timber in question, it was properly valued at 4,862*l.* 10*s.* 10*d.* if sold to a mineowner for use in his mine ; and that, if not, it was properly valued at 8,125*l.* 16*s.* 3*d.*, as representing the economic value in the open market on January 1, 1947. The parties also agreed that the value, on the basis that the Order applied and that the sale was to someone other than the

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mineowner for the purposes of his mine, was 6,317*l.* 7*s.*1*d.* The referee held, on the true construction of s. 13 of the Act, that, as the basis of compensation was a sale in the open market, the order of 1944 was not applicable with regard to the fixing of a price, and he accordingly, subject to the opinion of the court, directed the valuation board to increase the valuation of the claimant's stocks of mining timber from 4,862*l.* 10*s.* 10*d.* to 8,125*l.* 16*s.* 3*d.*

If he were wrong in his decision and the order had to be taken into consideration, he had to consider whether the controlled price obtainable should be taken as that obtainable on a sale to a mine owner for his coal mine or to any other person. In the absence of evidence on that point, he assessed fifty per cent. of the timber on each basis, and accordingly he assessed the value at 4,862*l.* 10*s.* 10*d.*, plus half the difference between that sum and 6,317*l.* 17*s.* 1*d.*, namely 5,590*l.* 4*s.*

The referee's "final and conclusive direction" accordingly was that, if neither party gave notice within the prescribed time of a desire to submit the matter for the opinion of the court, the Northern District Valuation Board should increase the determination of the value of the timber to 8,125*l.* 16*s.* 3*d.* The board and the Minister of Fuel and Power appealed.

Sir Hartley Shawcross A.-G., *Colin Pearson K.C.* and *Marnham* for the appellants. At the primary vesting date the timber was controlled in price and had been so since the beginning of the war (1939). There is no doubt that this timber was in fact acquired at that controlled price or at a lower price, and it is the duty of the referee to take that fact into consideration, as one of the relevant circumstances, under s. 13, sub-s. 5, of the Coal Industry Nationalisation Act, 1946, when determining the valuation of the timber. The value to be ascertained is the amount which the unit might have been expected to realize on January 1, 1947, if voluntarily sold by a willing seller to a willing buyer under prevailing conditions and subject to any restrictions then in force. The sale must be a notional one, but a notional sale in the market in which, and subject to the conditions under which, willing buyers and sellers could legitimately have operated on January 1, 1947. It follows, therefore, that, when valuing timber at the material date, the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, must

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apply. By that Order prices are prescribed for the sale of imported mining timber, and maximum prices for the sale of home-grown timber. The fixed prices of imported timber differ according to the personality of the buyer, being substantially lower when the sale is to the owner of a coal mine situated in Great Britain. The most probable purchaser of such timber would be the owner of a coal mine situated in Great Britain, and the valuation should be calculated on that basis. The referee misdirected himself in thinking that there could be a combination of purchasers. The referee should have followed the principle clearly stated in *Swift & Co.* v. *Board of Trade* (1). [They also referred to *Poplar Assessment Committee* v. *Roberts* (2)].

MacKenna K.C., and *Featherstone* for the claimants. The appellants' argument assumes that s. 13, sub-s. 4, of the Act of 1946 postulates a hypothetical sale of the whole unit, comprising many things besides timber, in one lot. It further assumes that if such a sale had been made in the actual market on January 1, 1947, it would have been governed by the Mining Timber Prices Order, 1944. Let both assumptions be accepted: the claimants still say that s. 13, sub-s. 4, directs that the unit shall be valued at the amount which it might have been expected to realize on a sale in the open market, and that the actual market on January 1, 1947, was not an "open market." If the actual market was not an "open "market," the valuer must assume a hypothetical market. The actual market was not an open market because it was controlled by two Orders, the Control of Timber Order (No. 32) (General Provisions) Order, 1944, and the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944. Under the one Order no one could buy imported timber unless specially authorized by the Minister, and only a limited class of persons could buy home-grown timber without such an authority. Under the other Order no one could buy imported timber except at a fixed price, or home-grown timber at a price exceeding the maximum market. A market controlled in these respects is not an open market. An open market is one in which a seller can expect to obtain the full value of his property through the competition of every possible buyer. Where the buyers are a restricted class and where they are not permitted to compete with each other there is no open market. The competition of buyers is of the essence of an open market. The Mining Timber Prices Order of 1944 fixes two prices for each kind of timber, according to whether the buyer is the owner of a coal mine or some other person. In effect it creates two markets, limiting each market to one class of buyer and closing it to the other.

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(1) [1925] A. C. 520.

(2) [1922] 2 A. C. 93.

Inland Revenue Commissioners v. *Clay* (1) shows that the purpose of providing for compensation as on a sale in the open market is to ensure that the owner will get the full value of his goods as the result of free competition between buyers. *Swift & Co.* v. *Board of Trade* (2) is distinguishable. There the Order provided that the owner of the goods should be given "compensation." The Order did not define "compensation." The owner of the goods had brought them to England for sale. If he had sold them in England he could not have realized more than the controlled price. The arbitrator was told that if he found that the goods, but for requisitioning, would have been sold in England at a time when a maximum price order was in force the compensation could not exceed that price. The Order in that case said nothing about a valuation being made in an open market. In *Poplar Assessment Committee* v. *Roberts* (3), the court, in fixing a hypothetical rent, disregarded the controlled rents which alone were payable in the actual market.

In any event the award should rest on the higher of the two prices fixed by the Mining Timber Prices Order. The appellants' argument is that s. 13, sub-s. 4 presupposes a sale of the whole unit to one buyer. They say that that buyer would in all probability have been the person buying the colliery. The claimants say that the subsection does not require the valuer to assume a sale in one lot, or a sale to the person buying the colliery.

[The court here intimated that it was not open to the claimants to argue that the unit would not have been sold in one lot to the buyer of the colliery, since the claimants had before the district valuation committee accepted the assumption of such a sale.]

Even on the assumption that the compensation unit would have been sold in one lot to the same person who bought the colliery, there is no reason for assuming that the sale of the unit would have preceded the sale of the colliery. If the

(1) [1914] 3 K. B. 466.

(2) [1925] A. C. 520.

(3) [1922] 2 A. C. 93.

sale of the unit had preceded the sale of the colliery, or had been contemporaneous with it, the buyer of the timber would not have answered the description of the owner of a coal mine buying for use in the mine, and the higher price would have been payable. Therefore the compensation should be the higher of the two prices.

Pearson K.C. in reply. The words "open market" in s. 13, sub-s. 4 of the Coal Industry Nationalisation Act, 1946, mean the actual market, with all its material advantages and disadvantages; and there are no grounds for saying otherwise. Had some hypothetical market been intended, then the Act would have so stated. The hypothetical sale envisaged is one of the entire single unit which must be treated as a whole, and there can only be one valuation. The market is open to anyone to make purchases in accordance with the law, and it is open to the two types of buyer defined in the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944.

There is no distinction between this case and *Swift & Co.* v. *Board of Trade* (1), except that there is no necessity here, as there was in that case, to assume any inferences regarding compensation, since there is express provision for it in the Act of 1946. The measure of compensation to be paid is the normal amount that the owner would expect to receive if he sold the unit in the actual market. The valuation board made a draft valuation which they arrived at by placing a price on the timber as if it were sold to a mineowner, and the burden of proving that valuation to be incorrect was on the claimants. The valuation board determined the valuation and the referee had to review it, but there were no grounds on which he could interfere with it.

A person could be an owner of both a mine and a stores at the same time and would thus answer the description of an owner as defined in the Order. The correct price, therefore, to be charged for the timber would be the price to the owner of a coal mine situate in Great Britain.

Cur. adv. vult.

May 12. MORRIS J. read the following judgment of the court. The questions at issue arose in the course of a review by the referee of a determination made by the Northern

(1) [1925] A. C.520.

District Valuation Board which was established under s. 12 of the Coal Industry Nationalisation Act, 1946.

It is provided by s. 10, sub-s. 1 of that Act that compensation is to be made, as set out in the Act, in respect of the transfer to the National Coal Board of the "transferred interests." By s. 10, sub-s. 5 it is provided that for the purposes of compensation the "transferred interests" are to be dealt with in "compensation units" each one of which is to be allocated to one of the valuation districts.

The compensation unit which is the subject of the present proceedings comprises certain transferred interests of Priestman Collieries Ld. The unit consists of a large quantity of mining stocks and stores including a quantity of mining timber.

[His Lordship referred to the proceedings leading up to the hearing before the Divisional Court, and proceeded :]

By s. 13, sub-s. 1 of the Act of 1946 : " As soon as may be " after a compensation unit has been allocated to a valuation " district, and it has been determined under section eleven " of this Act whether and to what extent the value of each " transferred interest included therein is attributable to usefulness for activities relevant to district wages ascertainments, " the district valuation board for the district shall determine " the value of the unit and determine how much of that value " is coal industry value and how much of it is value for subsidiary purposes."

By s. 13, sub-s. 4 : " For the purposes aforesaid the value " of a compensation unit shall be taken to be the amount " which it might have been expected to realize if this Act had " not been passed and it had been sold on the primary vesting " date in the open market by a willing seller to a willing buyer, " no allowance being made on account of the vesting of the " transferred interests comprised in the unit being compulsory." There follows a proviso not for present purposes material.

Section 13, sub-s. 5 provides : " For the purposes of the " last preceding subsection, the sale of a compensation unit " to be assumed shall be a sale thereof (with all property and " rights which are to vest in the board, by virtue of regulations " made under or by virtue of section five or six of this Act, " with the transferred interests included in the unit) subject " to all matters subject to which those interests are to vest in " them, but free from any charge or lien for securing money " or money's worth or other matters free from which those " interests are to vest in them ; and regard shall be had to all "relevant circumstances . . . ." Five sets of circumstances are then enumerated, of which the material are "(*a*) to the "state of the things in which the transferred interests subsisted "at the date of their vesting in the board," and (*b*) "to all "relevant facts known at the time of the determination or "review which were in existence on the primary vesting "date, notwithstanding that any of them would not have been "known at that date." The primary vesting date was January 1, 1947. On that date there was in force the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944 (St. R. & O. 1944, No. 920). By that Order fixed prices were imposed for imported mining timber and maximum prices for home-grown mining timber.

[His Lordship referred to the alternative valuations set out in the special case, and continued :]

The first question which arises for the opinion of the court is formulated by the referee as follows : "Whether in determining the value of the stocks of mining timber in question "the Northern District Valuation Board must or must not "take into account the existence of the Order controlling prices "at the material date and determine the value in accordance "with the provisions of that order." A second question is formulated which arises if the court is of opinion that the terms of the Order controlling prices are applicable. With regard to the first question the matter depends on the meaning of the phrase "open market" as used in its context in s. 13, sub-s. 4 of the Act of 1946.

The main submission made on behalf of the Minister of Fuel and Power was that the value to be ascertained was the amount which the unit might have been expected to realize on January 1, 1947, if voluntarily sold by a willing seller to a willing buyer under conditions then actually existing and subject to any and all restrictions that would on that date apply to anyone who chose to sell or to anyone who chose to buy.

On behalf of the claimants it was submitted that, because of the existence of price regulation for mining timber as ordered by the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, and because of the fact that by the Control of Timber (No. 32) (General Provisions) Order, 1944 (St. R. & O. 1944, No. 917) limitations were imposed on the class of those who could buy or sell timber, no open market could be said to exist. It was submitted that there can be no open market where prices are fixed or where maximum prices are imposed and there are bidders prepared to go beyond such prices. It was further contended that the phrase "open market" pre-supposed and contemplated a market in which a seller could expect to receive the highest unlimited price which resulted from the free competition of all potential buyers.

In the opinion of the court, the phrase "open market" in s. 13, sub-s. 4 of the Act does not contemplate a purely hypothetical market which is to be regarded as exempt from any restrictions imposed by law. The section does not postulate conditions wholly divorced from reality. The directed inquiry in effect is: "what would the sale of the unit have realized "on January 1, 1947?" In pursuing that inquiry it must be assumed that on that date the seller was willing to sell and that the buyer was willing to buy; any notion of a compulsory sale must be ignored. The seller must be deemed to have done as well as a willing seller would reasonably have been expected to do on January 1, 1947. But that does not mean that he should be regarded as a person not bound by the law. It must be assumed that he would deal on the market on January 1, 1947, subject to the law of the land. Any restriction or limitation imposed on him by law or imposed on any willing buyer must be recognized and taken into account. The sale to be regarded for the purposes of s. 13, sub-s. 4 must be a notional one, but a notional sale in the market in which and subject to the conditions under which willing buyers and sellers could legitimately have operated on January 1, 1947. It is enjoined by s. 13, sub-s. 5 that regard should be had "to all relevant circumstances." What is contemplated, therefore, is a sale that might have taken place in the actual market on the prescribed date—rebus sic stantibus.

The court was referred to certain authorities. We are of opinion, however, that no direct or conclusive assistance is derived, when deciding the meaning in its context of the phrase now under consideration, from authorities which concern other phrases in other contexts. Thus, in *Swift & Co.* v. *Board of Trade* (1), consideration was given to words of a regulation which applied to the assessment of compensation to be paid for requisitioned food. The words were—"but in "determining the amount of the compensation the arbitrator "shall have regard to the cost of production of the article "and to the allowance of a reasonable profit, without

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(1) [1925] A. C. 520, 522, 545, 547.

"necessarily taking into consideration the market price of "the article at the time." It was held that the regulation did not warrant the awarding of an amount more than could have been legally realized by an actual sale, and that an arbitrator had to ascertain what the requisitioned goods would, if not requisitioned, have produced under all the conditions which existed at the time when they would have been sold, including the maximum controlled prices.

It is not without interest to note that in his speech Lord Sumner said in that case: "Compensation is not given for the "requisitioning of the article itself, for the compulsory acquisition, for disadvantage arising from maximum prices or other "war measures, or for the lapse of time between the original "requisition and the publication of the award, and as the "entire transaction is sui generis, these things must either "be expressly given by the regulation or they are not given "at all." Later in the speech he said: "He must not give "compensation for any form of loss except for the article "requisitioned itself, and he must not put upon it for purposes "of compensation a price, which it would have been illegal "for the merchant to realize if left to himself."

The court is of opinion, however, that the present question is essentially one of the construction of the particular provisions of s. 13 of the Act of 1946, and for the reasons assigned we answer the first question presented for our opinion in the affirmative. The result is that the Northern District Valuation Board were obliged to take into account the existence of the order controlling prices at the material date, and to determine the value of the stocks of mining timber in accordance with its provisions.

The second question for the opinion of the court is stated by the referee as follows: "If the terms of the Order are "applicable, then should the scale on which the amount of "the valuation is determined be that of the prices to the "owner of a coal mine situate in Great Britain when buying "for use in that mine, or that of the prices to any other buyer, "or any and, if so, what combination of the two?" On behalf of the claimants it was submitted that the wording of s. 13, sub-s. 4 of the Act does not postulate, or necessarily postulate, the sale of a compensation unit as a sale in one lot; and that, if the unit were broken into lots and sold in lots, then the mining timber might have been sold to someone other than a coal owner. The practical significance of these contentions results from the fact that in the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, one range of prices is fixed for imported timber in the case of a sale to the owner of a coal mine situate in Great Britain when buying for use in the coal mine, whereas a higher range of prices is fixed in the case of a sale to any other buyer.

In this particular case the hearing before the Northern District Valuation Board proceeded on the basis that the notional purchaser would be the owner of a coal mine. In the written reasons of the board it is recited that, " it was agreed " by both sides that the sale of this unit would be at the site " where the various items lay and that the purchaser who " would offer the best price would be a purchaser who was " going to use the articles comprised in the unit on that site." This very reasonable agreement seems to postulate that the purchaser who would give the best price would be a purchaser of the coal mine. The further contention was advanced on behalf of the claimants that, even on a concurrent sale of the timber and the coal mine to the same purchaser, the lower range of prices would not operate because the sale of the timber would not be a sale to someone who was at the time of the sale already " the owner of a coal mine." In the opinion of the court, this last contention proceeds on too narrow a basis to make it reasonable or acceptable ; and in any event a purchaser of the coal mine and of the stores and stocks could in practice so arrange the dates and sequences of his purchases that he would qualify to purchase the imported mining timber at the lower range of prices.

In the opinion of the court, this second question is in this case concluded by the common agreement of the parties on the basis of which the matter proceeded before the Northern District Valuation Board. Accordingly the court answers the second question by deciding that the scale on which the amount of the valuation is determined is that of the prices to the owner of a coal mine situate in Great Britain. The court is in agreement with the decision of the Northern District Valuation Board when they determined " . . . . that the " value of the stocks of mining timber comprised in this unit " on the primary vesting date as between a willing buyer " and a willing seller in the open market is that prescribed " by the regulations of 1944, and that the value for imported " timber is that laid down in sch. 1, part 1, col. 3, and that

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"the value for home-grown market timber is the maximum "price prescribed by sch. 1, part 2."

Appeal allowed.

MacKenna, K.C. [on the question of appeal]. There is a doubt whether an appeal lies from the Divisional Court's decision; but it seems clear that if an appeal does lie the claimants must ask the court for leave to appeal.

LORD GODDARD C.J. It does not seem to the court that an appeal lies, for it is laid down that the decision of the court shall be final and conclusive.

MacKenna K.C. There is doubt whether the minister's regulation to that effect is not ultra vires. An argument in that sense could be founded on a provision of the Coal Industry Nationalisation Act concerned with the rule-making power, which says that no regulation shall be made on the subject of court procedure. Such an argument would necessarily be addressed to the Court of Appeal. The regulation in question is reg. 40.

LORD GODDARD C.J. We will not decide whether or not an appeal lies, but it is obviously a case in which the claimants may have leave to appeal if there be a right of appeal.

Solicitors: *Treasury Solicitor; Watson, Burton, Booth and Robinson, Newcastle-on-Tyne.*

L. F. J. McD.

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Mar. 29.

Lord Goddard C.J., Humphreys and Jones JJ.

Landlord and tenant—Rent tribunal—Principles of procedure—Reduction of rents to less than economic figure—Landlord without remedy if statutory procedure observed—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40)*—Landlord and Tenant (Rent Control) Regulations,* 1949 (*S.I.* 1949, *No.* 1096).

So long as a rent tribunal observe the procedure prescribed for them by the Landlord and Tenant (Rent Control) Regulations,

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

1949, made under the Landlord and Tenant (Rent Control) Act, 1949, when entertaining a reference to them of a tenancy under that Act, their decision is not open to challenge by way of orders of certiorari or mandamus, though the procedure so prescribed is, in its informality, not in accordance with the procedure observed in courts of law or other statutory tribunals. In particular, a rent tribunal may act on their own impression and knowledge; and a landlord has no remedy if, the statutory procedure having been observed, the rent tribunal reduce the rent to an uneconomic figure—that is to say, to a figure constituting a hardship in view of the high price which he has paid for the freehold of the demised premises—or to a figure which may cause him, as the owner of a block of flats, a loss which he is unable to sustain.

APPLICATIONS for orders of certiorari and mandamus.

The applicants, Marine Parade Estates (1936), Ld. were the landlords of a block of modern flats of high quality at Marine Gate, Brighton. The tenants of flats A5, C4, D4, and E4 applied to the respondents, the Brighton and Area Rent Tribunal, under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, to fix the reasonable rent for each flat. All the flats had been let for the first time since September 1, 1939, and therefore, by virtue of the Rent and Mortgage Interest Restrictions Act, 1939, the rents at which they were let at the date of the application were the standard rents.

Members of the tribunal inspected the flats before the hearing, which was on September 21, 1949. At the hearing counsel acting for the tenants addressed the tribunal, but called no evidence in support of his statements. The landlords called two chartered auctioneers, one chartered surveyor and one chartered accountant who gave evidence to show that the existing rents were reasonable. Those witnesses were not cross-examined. One witness produced a detailed schedule showing the gross income derived from the flats and the expenses of maintaining them, but the tribunal did not examine the document.

The tribunal made reductions in the rents varying from 35*l*. to 50*l*. The landlords now sought an order of certiorari to have those determinations quashed and an order of mandamus directing the tribunal to hear the references according to law.

Gerald Gardiner K.C. and *Alan Campbell* for the landlords. In assessing a "reasonable rent" under the Act of 1949, there must be a profit to the landlord, always assuming sound finance and management, since the Act was not designed as a penal statute, but to provide accommodation at fair prices. In reducing the rents the tribunal acted contrary to the evidence adduced before them. They disregarded the landlords' evidence to the effect that any reduction would involve a cumulative yearly loss on the property.

An order of certiorari lies where a body exercising quasi-judicial functions does not act on the evidence; or disregards the principles of natural justice: *Errington* v. *Minister of Health* (1); or does not act judicially: *Board of Education* v. *Rice* (2). There was no evidence to suggest inefficient management by the landlords. It is a misuse of the power conferred by Parliament to deprive a landlord of all profit. Where there is such misuse, the court can interfere: *Rex* v. *Paddington and St. Marylebone Rent Tribunal*; *Ex parte Bell London & Provincial Properties, Ld.* (3) It is also contrary to natural justice. No reasonable person on the evidence could have come to this conclusion. The tribunal must have had regard to some extraneous consideration, and therefore certiorari will lie: *Reg.* v. *Bowman* (4).

Alternatively, where a quasi-judicial tribunal have exercised a discretionary power capriciously, mandamus will lie to require them to hear and determine according to law: *Sharp* v. *Wakefield* (5).

The importance of the case lies in the proviso to s. 1, sub-s. 1, of the Landlord and Tenant (Rent Control) Act, 1949 (6) which provides that once a rent has been determined by a tribunal it can never be brought before them again for revision.

It has been the universal experience with these quasi-judicial tribunals that some means has to be found to correct manifest excesses and provide some standard of uniformity. Here the only remedy for a subject who has suffered wrong is one or other of the prerogative writs.

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(1) [1935] 1 K. B. 249, 268.

(2) [1911] A. C. 179, 182.

(3) [1949] 1 K. B. 666.

(4) [1898] 1 K. B. 663, 666.

(5) [1891] A. C. 173, 179–181.

(6) Landlord and Tenant (Rent Control) Act, 1949, s. 1, sub-s. 1: "Where apart from this section "the standard rent of a dwelling-"house would be—(*a*) the rent "at which it was let on a letting "beginning after the first day of "September, nineteen hundred "and thirty nine . . . . then ". . . . the landlord or the tenant "may make application to the "Tribunal to determine what "rent is reasonable for that "dwelling-house, and on any "such application the Tribunal "shall determine that rent and "shall notify the parties of their "determination.

"Provided that an application "shall not be made in respect of "a dwelling-house if a previous "application in respect thereof "has been made under this "subsection."

Sir Hartley Shawcross A.-G. and *Ashworth* for the tribunal. The use of procedure appropriate to courts of law is not an essential ingredient of "natural justice"—a term which is in any case of little value in law: see per Lord Shaw of Dunfermline in *Local Government Board* v. *Arlidge* (1). It is a misconception to speak of evidence in connexion with tribunals who have no power to summon witnesses or administer an oath. Their duty is to determine the matter before them at their discretion and on their own knowledge.

Certiorari is not appropriate to a matter of this kind. It lies where an order is bad in law on its face, or where an inferior court entertains a matter outside its jurisdiction. That question is determinable at the beginning of the proceedings and does not depend on their result: *Rex* v. *Nat Bell Liquors, Ld.* (2); *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Kendal Hotels, Ld.* (3).

If any writ lies at all in this case, it is mandamus. But even mandamus lies only where the tribunal have refused either in terms or by conduct to exercise jurisdiction, or where it is clear that they have had regard to extraneous considerations and been influenced by them: see *Rex* v. *Port of London Authority; Ex parte Kynoch Ld.* (4); Halsbury's Laws of England (2nd ed.), vol. 9, pp. 764-5, para. 1296. It must be clear that they have so acted, and not merely an assumption.

As for the merits of the case, the fact that the landlords make a loss is not conclusive of the matter. It might be, for instance, that too high a rent was charged in one case in order to recoup the landlords for losses on other flats.

[LORD GODDARD C.J. The uncontradicted evidence before the tribunal was that these rents were fair compared with those charged for similar premises in Brighton. The tribunal have picked some perfectly arbitrary figure.]

The tribunal cannot be bound by the opinion of witnesses on the rent: see *Rex* v. *Westminster Assessment Committee; Ex parte Grosvenor House (Park Lane), Ld.* (5). To send this case back amounts to saying that they must accept the evidence of experts. But it was intended by Parliament that they should act on their own experience and knowledge.

(1) [1915] A. C. 120, 138.
(2) [1922] 2 A. C. 128, 159–161.
(3) [1947] 1 All E. R. 448.
(4) [1919] 1 K. B. 176.
(5) [1940] 2 K. B. 350; [1941] 1 K. B. 53.

The tribunal are in no sense a court. Once set in motion, they have to fix a reasonable rent, whether the application is withdrawn or not. Like an assessment committee, they have no duty to communicate the sources of their knowledge: see *Rex* v. *Westminster Assessment Committee; Ex parte Grosvenor House* (*Park Lane*) *Ld.* (1). The tribunal were entitled to consider the rateable value of these flats (about 60*l.* a year), in relation to their decision as to a reasonable rent. An order of mandamus to hear and determine according to law is inappropriate because the tribunal have done all that they are bound by law to do, and have offended against neither the Act nor the regulations (2).

Gardiner K.C. in reply. Certiorari lies where an order is bad on its face, where there is excess of jurisdiction, and also where a quasi-judicial body has not acted in accordance with natural justice. In the *Grosvenor House* case (1) there was no question of want of jurisdiction: the Divisional Court made an order of certiorari on the ground that the assessment committee had not acted in accordance with natural justice in that they had considered a report which they did not show to one of the parties. Denial of natural justice was the ground of the orders made in *Rex* v. *Wandsworth Justices: Ex parte Read* (3) and *Rex* v. *Kingston-upon-Hull Rent Tribunal*; *Ex parte Black* (4).

The tribunal's proceedings are admittedly informal; but, if any evidence given is not open to cross-examination, then the proceedings are not conducted in accordance with natural justice.

[LORD GODDARD C.J. That would be contrary to justice in this court: but is it contrary to the conception of justice established by this legislation?]

Yes. The proposition also applies to these tribunals: see *Errington* v. *Minister of Health* (5). True, there is no cross-examination if a party makes a written application only and does not appear. But in that case there is an opportunity to peruse the written application beforehand.

It was a further denial of natural justice to stop the evidence of a witness who wished to present the schedules of profits and expenses. The tribunal implied that they were accepting that witness's evidence, and then made an opposite decision.

(1) [1940] 2 K. B. 350; [1941] 1 K.B. 53.

(2) The relevant regulations are quoted in the judgment of Lord Goddard C.J.

(3) [1942] 1 All E. R. 56.

(4) (1949) 65 T. L. R. 209.

(5) [1935] 1 K. B. 249, 268.

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There was no evidence that the rent was unreasonable or extortionate. The whole evidence was the other way. The result of the decision is that the landlords must go into liquidation. Such a decision must be capricious, or else the tribunal must have taken into account some consideration not disclosed to the landlords.

It is submitted that the tribunal have disregarded the evidence and have acted capriciously and contrary to natural justice, and that their decision should be quashed, or the whole matter be sent back to be determined according to law.

Lord Goddard C.J. The applicants are the landlords of a large building in a good position in Brighton. It is divided into flats let at substantial rents. They are not working-class dwellings, but dwellings in which, no doubt, professional men and others in a similar walk of life live. Certain of the tenants, although they had agreed to pay the rents reserved—and I dare say that they were extremely glad to get the flats at those rents—considered afterwards that they were paying rather too much; and so they thought that they would try their luck at getting the rents reduced under the Landlord and Tenant (Rent Control) Act, 1949.

Accordingly, there was a hearing before the respondent rent tribunal. The tenants submitted to the tribunal the statutory forms and, really, nothing else. These forms indicate the position of the premises, describe them, specify the landlords, and the rents at which the premises are held, and state whether the tenant or the landlord bears the rates, what services the landlord undertakes to provide, and the rateable value—for it is on the rateable value or rent that the jurisdiction of the tribunal depends. These were all flats let for the first time after September 1, 1939, and it was by reason of their being let since that date that the application could be made. The Rent Restriction Act of that year, which was passed immediately on the outbreak of war, provided that, where premises had not been let before September 1, 1939, the rent at which they were first let after that date should be the standard rent. As these flats were all let for the first time after September 1, 1939, prima facie, the rent at which they were let became the standard rent.

The tenants were entitled to more than the mere accommodation: they had central heating, constant hot water, the service of porters, and the use of lifts. There were other

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amenities, some of which had already been provided and others which were going to be provided. In short, they enjoyed the amenities and accommodation usually offered in a block of modern flats. Nevertheless certain of them were not content to go on paying the rent which they had agreed to pay, and they took advantage of the Landlord and Tenant (Rent Control) Act, 1949.

When the matter came before the tribunal, the tenants called no evidence, but counsel who appeared for them made certain statements. Mr. Gardiner has submitted that it was wrong procedure on the part of the tribunal to allow counsel to make those statements; but in point of fact no statement made was inaccurate, and the statements were afterwards accepted as accurate. Several witnesses called on behalf of the landlords gave evidence at length and do not seem to have been cross-examined.

It is true that at any rate one of them proffered to the tribunal certain schedules showing figures which the tribunal seem not to have examined: perhaps they would not have understood them if they had. That must be a matter entirely for the discretion of the tribunal.

They then reserved their judgment, and subsequently gave a decision by which in each case they made, not an enormous, but a substantial reduction, in the rent. The average reduction was about 50*l.* a year. It is not necessary to burden this judgment with the exact figures, for they do not come into account.

Amongst other things of which the landlords complain, and the court recognizes that it is a serious matter for them, is that they have shown on their figures that, with the rents as they were, they were getting no return on their outlay and were in fact making a loss on this building; and that, with these reduced rents they will make a still further loss and, indeed, it is said, will have to go into liquidation. How far that should be taken into account by the tribunal is a matter which, of course, they must decide for themselves; but it certainly cannot be conclusive: for instance, a speculator—I am not using that expression offensively—a person who goes in for buying and selling properties, might well buy a house, at a time when the prices prevailing were very high, for, say, 10,000*l.* He might then divide up the house into a variety of tenements or flats and let them at varying rents which, presumably, would show him a profit.

Yet the tribunal could not in my opinion and, I think, in that of my brethren, be debarred from saying in any particular case that the rent which he was charging was excessive and ought to be reduced having regard to the accommodation which was being offered. If the rent as reduced is a fair one for the accommodation which is let to the tenant, it will be no answer for the landlord to say that if the tenant pays only that reduced rent he (the landlord) must go out of business. It may be a hardship on the landlord, but we cannot see that that of itself is a reason for saying that a rent which has been fixed by him is necessarily fair to the tenant.

The real complaint made here is that the tribunal, it is alleged, disregarded what are called the principles of natural justice. If they did, it is said, certiorari will lie to bring up their decision; or, in any case, even if certiorari will not lie, mandamus will lie directing them to hear and determine according to law. We have had an interesting argument, with the citation of many cases, on the question when certiorari will lie and in particular whether it will lie where this court finds that an inferior court or tribunal has acted contrary to natural justice. It is not necessary in this case to express any further opinion on that matter or to say which of the two prerogative writs would have been appropriate if we had come to the conclusion that we could issue either; for we have formed the opinion (in one sense reluctantly, I do not hesitate to say) that we cannot interfere in this case or issue either writ in respect of these decisions.

First of all, we have to consider the purpose of the Act as well as its terms. The object of the Act, as is conceded on both sides, is these rents which became standard rents after September 1, 1939, by reason of the fact that the premises were first let after that date. Accommodation was not so scarce at the beginning of the war as it subsequently became. In great cities, those especially which were exposed to enemy action, accommodation became severely limited by destruction. According to the ordinary laws of supply and demand, rents tended to rise, and to such a height that Parliament thought it necessary to say, in effect by the Landlord and Tenant (Rent Control) Act, 1949: "Although in September, 1939, "we said that the standard rents of these various premises "were to be the rents at which they were first let after "September 1, 1939, we now have to modify that enactment "because the demand has become greater and greater, and "rents which have become standard rents may be excessive—"not necessarily exorbitant; but they may be more than "people can fairly be expected to pay." Accordingly, Parliament decided that the standard rents should be open to review by the tribunals which were set up by Statute in 1946 for the purpose of controlling furnished lettings.

By s. 1 of the Act of 1949: "Where apart from this section "the standard rent of a dwelling-house would be—(*a*) the "rent at which it was let on a letting beginning after "September 1, 1939, or (*b*) an amount ascertainable by "apportionment of the rent at which a property of which it "formed part was let on such a letting as aforesaid (whether "such an apportionment has been made or not), then, subject "to the provisions of this section, the landlord or the tenant "may make application to the tribunal to determine what rent "is reasonable for that dwelling-house, and on any such "application the tribunal shall determine that rent and shall "notify the parties of their determination: Provided that an "application shall not be made in respect of a dwelling-house "if a previous application in respect thereof has been made "under this sub-section."

That proviso is very sweeping: apparently it does not allow a landlord, although he may be put to much greater expense by reason of rising wages, increases in the price of coal, and so forth, to apply to the rent tribunal at a later date and ask that the rent which has been lowered should be increased again. That, however, has been decided by Parliament, and it is not for us to express an opinion on the policy of the Act. I merely point out that it must be recognized that it may in some cases work very considerable hardship.

In pursuance of power given by the Act of 1949 the Landlord and Tenant (Rent Control) Regulations, 1949 (S.I. 1949, No. 1096) were made. By reg. 3: "All applications under "the Act to a tribunal shall be made in writing, and shall "specify the address of the dwelling-house to which the "application relates, the names of the landlord and tenant "and the address of the landlord." That is all that the tenant has to do on making application to a tribunal. By reg. 4: "Where an application is made to a tribunal, "the tribunal shall give notice in writing to each party to "the tenancy of the dwelling-house in respect of which the "application is made informing him that he may within such "time as the tribunal may allow (not being less than seven "days from the date of the notice) give notice to the clerk "of the tribunal that he desires to be heard by them, or may "send to the clerk of the tribunal representations in writing."

Observe: the tenant, having made his application on the prescribed form, has done all that he is required to do to set the tribunal in motion. He may—not "must"—apply to be heard in person, or he may—not "must"—make representations in writing. If he makes representations in writing, the tribunal must consider his representations; but there is no provision here that, if he makes a representation in writing, the landlord, the other side, may call upon him to be produced for cross-examination on his statement. He need only make a statement.

Regulation 5 provides: "If either party to the tenancy "informs the clerk of the tribunal that he desires to be heard "the tribunal shall give to each party not less than seven "clear days' notice in writing of the time and place at which "the parties will be heard." That, again, is certainly significant: it is only if the parties give notice that they desire to be heard that they are to have notice of the time and place when the tribunal will consider the matter. The tribunal have to consider the matter merely because the prescribed form has been sent in. Therefore it is perfectly clear that the intention of the Act and of these regulations made under it is that the tribunal may proceed to give a decision without hearing either party unless he states that he wishes to be heard.

It is obvious, therefore, that Parliament intended that the procedure of these tribunals should be of the most informal nature that it is possible to conceive. No court of law can ever proceed to hear a case without having some evidence before it. No court of law can proceed to give judgments affecting people's rights of property unless those people not only are before it but have an opportunity of cross-examining the other side. It is quite obvious here that Parliament has said that the ordinary procedure to which lawyers are accustomed shall not apply to these cases. The probable reason is, as the Attorney-General has stated, that it was supposed that the great majority of cases which would come up for determination under this Act would concern small properties—working-class properties—and unfurnished lodgings, though it may be that "lodgings" is not the right word —but separate rooms in houses.

By reg. 7, however: "At any hearing before a tribunal "any interested party may appear in person or by counsel "or a solicitor or by any other representative or may be "accompanied by any person whom he may wish to assist "him at the hearing." By reg. 8 (1.): "Subject to the "provisions of these regulations the procedure at a hearing "shall be such as the tribunal may determine, and the tribunal "may, if they think fit, and at the request of either party "shall, unless for some special reason they consider it "undesirable, allow the hearing to be held in public. (2.) The "tribunal may postpone or adjourn the hearing from time to "time as they think fit."

Obviously, therefore, the intention of Parliament was that the procedure at these tribunals should be as informal as possible. Mr. and Mrs. Smith or Mr. and Mrs. Brown, when they want their rent reduced, cannot be expected to have the services of expert witnesses at their disposal: if they go before a tribunal, all that they can say is that they think that they are paying too much—probably they will say that Mrs. Sykes round the corner is paying rather less than they are. That is the sort of thing which it was intended that these tribunals should have before them. The landlord may very likely appear with expert witnesses whom Mrs. Smith and Mrs. Brown would be quite incapable of cross-examining; and it is not intended that there should be a hearing in anything like the way in which courts of law conduct their business or the way in which public inquiries under other statutes and other regulations are meant, but very often fail, to be conducted, so that they are the subject of many cases from the House of Lords downwards.

Therefore, it seems to me, the tribunal must be able to act on their own impression and on their own knowledge; otherwise the thing would come to a standstill altogether. The procedure which I have indicated can work only if the tribunal can act in that way and on their own inspection, if they like to make an inspection, of the premises, or on any information which they themselves may have. If witnesses are tendered, I have no doubt that it is the duty of the tribunal to hear them. If they are tendered and cross-examination is desired, it is the duty of the tribunal to allow that cross-examination. Then, if the other side wish to call evidence to answer it, it is, again, their duty to allow it. But, I repeat, it is quite obvious that these tribunals can act without having any evidence before them at all: neither party need appear; neither party need file any statement in writing unless he likes; a tenant can merely ask the tribunal to fix a proper rent; if he does, the landlord can appear, stay away, submit any statement, or, of course, call any evidence he likes.

How, therefore, can it be said that the tribunal in this case have offended against the rules of justice which this statute and these regulations made under it have established? That these proceedings have not been conducted in a way which would be tolerated in an ordinary court of law there is no doubt; but the ordinary courts of law are not governed by statutes like this of 1949, which permits these tribunals to act on their own knowledge and without any evidence. Here, it seems to me, in the first place the formalities prescribed by the Acts were observed: the tenants instructed counsel, but they did not think fit to give evidence themselves. That was a matter which might perhaps have weighed very strongly with the tribunal, but it apparently did not—that is for them, not for us. Counsel for the tenants made statements. It would be a very odd thing if we had to quash these proceedings because, although those statements might have been put into writing, they were made by counsel. If counsel had made a statement of fact which was not accepted or which turned out to be incorrect, perhaps different considerations might arise. As to that, I need not say anything because that is not the case here.

The tribunal heard all the evidence which was submitted to them by the landlords. Having done that, they were not bound to accept the figures which were put before them. That, I think, is made clear by *Rex* v. *Westminster Assessment Committee; Ex parte Grosvenor House (Park Lane) Ld.* (1). The tribunal gave their decision after they had heard all the evidence which was put before them, and, so far as I can see, they did not offend against any provision of the statute or any provision of the regulations. Therefore it is unnecessary to consider which form of writ would have been appropriate if we had come to another conclusion.

It would perhaps not be out of place for this court to make one observation, although no one recognizes more clearly than we that it is not our province to question the policy of the Act: possibly it might be a satisfactory state of affairs if there were some right of appeal to an appeal tribunal, such

(1) [1941] 1 K. B. 53.

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as has so often been given where these ad hoc tribunals are set up; that is to say, some central tribunal to which questions may be referred from the local tribunals. Though we recognize to the full the virtue and value of these tribunals and of these inquiries being held in an informal manner, it will be unfortunate if conflicting, or apparently conflicting, decisions are given by different tribunals in different parts of the country or, perhaps, in different parts of the same county, without there being any method of co-ordinating and correcting the decisions through central tribunal. That, however, is a matter for the legislature to take into account. These applications fail and must be dismissed.

HUMPHREYS J. So far as I am concerned, the judgment which my Lord has given is the judgment of the court.

JONES J. I agree.

Applications refused.

Solicitors: *Stanley Johnson & Allen; The Solicitor, Ministry of Health.*

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May 22.

Evershed M.R., Somervell and Asquith L.JJ.

BOURNE *v.* McDONALD.

[Plaint No. F. 663.]

County court—Jurisdiction—Agreement made in settlement of action—Failure of defendant to carry out terms involving erection of fence—Fresh action for specific performance of agreement—Competency—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 40, *sub-s.* 1; *s.* 52, *sub-s.* 1 (*d*); *s.* 71.

Although s. 52, sub-s. 1 (*d*) of the County Courts Act, 1934, gives the county court jurisdiction to determine proceedings for the specific performance of an agreement only when it is "an "agreement for the sale, purchase or lease of any property," the county court has jurisdiction to make an order for specific performance under s. 71 in regard to any action falling within its jurisdiction under s. 40.

An agreement was come to in settlement of a previous action between the parties whereby the defendant agreed, inter alia, to erect a fence between his property and that of the plaintiffs. The defendant subsequently repudiated that agreement, and the plaintiff thereupon brought an action claiming specific performance of the agreement and 10*l.* damages for breach of contract:

Held that the action was within the jurisdiction of the county court under s. 40, and that the court could therefore under s. 71 decree specific performance of the agreement to erect the fence.

APPEAL from Hanley and Stoke-upon-Trent county court.

The plaintiffs, one Bourne and his wife, and the defendant were neighbours as owners of adjoining houses, Nos. 32 and 34 Emery Avenue, Sneyd Green, Stoke-upon-Trent. The defendant erected a fence which, in the plaintiffs' view, encroached on their land and caused the approach to their garage to be too narrow for the passage of their motor-car. By a summons dated November 28, 1949, brought in the county court, the plaintiffs claimed possession and delivery up of the strip of land in question, an injunction and damages.

On January 3, 1950, the defendant agreed with the plaintiffs by their respective solicitors that, in consideration of the withdrawal of the summons, he would erect a new fence in place of the existing one to the satisfaction of the plaintiffs, so as to leave a minimum space of seven feet between the fence and their respective houses at the narrowest point. The defendant also agreed to pay the plaintiffs 30*l.* towards the costs of the action.

The plaintiffs therefore abandoned the proceedings but the defendant very soon afterwards refused to be bound by the arrangement. The plaintiffs therefore brought new proceedings in the county court, claiming (1.) specific performance of the agreement; (2.) the sum of 30*l.*; and (3.) damages limited to 10*l.*

The county court judge gave judgment in favour of the plaintiffs for the sum of 30*l.* and 5*l.* damages; but he held that he could not make the order for specific performance asked for, as the county court only had power to award specific performance of an agreement under the County Courts Act, 1934, s. 52, sub-s. 1 (*b*) when it was an agreement "for the "sale, purchase or lease of any property."

The plaintiffs appealed.

E. Brian Gibbens for the plaintiffs. The county court judge erred in holding that he had no power to grant specific performance of the agreement settling the original action. He would have been correct if only s. 52, sub-s. 1 (*d*) of the County Courts Act, 1934, could apply (1). This section covers matters specifically assigned to the Chancery Division. But the jurisdiction granted to the county court covers other contracts by s. 40, sub-s. 1; and, by s. 71, sub-s. 1, the county court can "grant "such relief, redress or remedy" as would be granted by the High Court in a like case. This enables the county court to grant specific performance of an agreement not relating to the matters specified in s. 52, sub-s. 1 (*d*). It would be a great hardship if this were not so in the present case, seeing that an application for a mandatory injunction would have been equally effective and would certainly have been granted. The agreement come to could really be regarded as an agreement as to title, and on that footing the plaintiffs could have obtained a declaration that the land on one side of the fence agreed to be erected was the plaintiffs' property. Either remedy would have sufficed but, however that may be, the county court judge was not justified in refusing an order for specific performance. Under s. 40, sub-s. 1, there is jurisdiction to give relief in a case founded on contract where damages are claimed, as they are here; and, that being so, specific performance could be awarded under s. 71, which is very wide: see Halsbury's Laws of England (2nd ed.), Vol. 31, p. 414.

Norman Carr for the defendant. Specific performance is an equitable remedy, and the jurisdiction of the county court in regard to equitable remedies is expressly dealt with in s. 52.

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(1) County Courts Act, 1934, s. 40, sub-s. 1: "A county "shall have jurisdiction to hear "and determine any action "founded on contract or tort "when the debt, demand or "damages claimed is not more "than 100*l*., whether on balance "or account or otherwise: . . . ."

Section 52, sub-s. 1: "A county "court shall have all the juris- "diction of the High Court to "hear and determine any of the "following proceedings, that is "to say— . . . . (*d*) proceedings "for the specific performance, or "for the rectification, delivery up "or cancellation, of any agree- "ment for the sale, purchase or "lease of any property, where, "in the case of a sale or purchase, "the purchase money or, in the "case of a lease, the value of the "property, does not exceed the "sum of 500*l*. . . . ."

Section 71: "Every county "court, as regards any cause of "action for the time being within "its jurisdiction, shall in any "proceedings before it—(*a*) grant "such relief, redress or remedy or "combination of remedies either "absolute or conditional . . . . "as ought to be granted or given "in the like case by the High Court "and in as full and ample a "manner."

It is true that by s. 71 wide powers are given to the county court to grant any remedy available in the High Court in a like case. But s. 52 dealt expressly with equitable remedies and must be taken to have restricted the county court's power in regard to any of those remedies in the manner then provided. Section 52, sub-s. 1 (*d*) therefore cuts down the matter in respect of which specific performance can be granted, and the county court judge was accordingly right in refusing to make an order for specific performance.

Gibbens replied.

Evershed M.R. [after stating the facts]. The judgment of the county court judge makes it plain that, apart from his decision that he had no jurisdiction to grant specific performance, he would have thought it right in the exercise of equitable jurisdiction to grant the remedy which the plaintiffs sought. He states: "I considered carefully the "evidence before me and the submissions made to me on "both sides, and I was satisfied and found that on January 3, "1950, the plaintiffs' solicitor and the solicitor then "acting for the defendant entered on behalf of their "respective clients into the agreement alleged by the plaintiffs, "and that in pursuance of the said agreement the plaintiffs' "solicitor took steps at once to withdraw the previous action. "I was also of opinion and found that in making the said "agreement on behalf of the defendant the solicitor then "acting for the defendant had the defendant's authority to "make that agreement and was acting in accordance with "his instructions, and that it was a binding agreement."

Although he does not in terms say so, I think it reasonably clear that the judge would have thought it a proper case in which to grant relief in the nature of specific performance if he had had the jurisdiction to do so. The third item of claim, "damages limited to 10*l*.", was fixed on the footing that specific performance of the bargain to rebuild could be carried out so that 10*l*. represented only the damage suffered by the plaintiffs through delay. When it dawned on the plaintiffs that this point about jurisdiction was likely to be a serious stumbling block in their way, they asked leave to amend their claim by adding a separate prayer for damages at common law for breach of the agreement or to claim damages under Lord Cairns' Act in lieu of specific performance. The judge, in the exercise of his discretion, thought it too late to allow such an amendment. He thought that it would not be just to give an entirely new cause of action to the plaintiffs after the case had for practical purposes been heard and tried out. Mr. Gibbens did suggest that we might give him leave even at this stage to amend, but it seems to me that that was a matter in the discretion of the county court judge and that we ought not to interfere.

It therefore remains a case in which the sole question is whether the judge was right in his conclusion that he had no jurisdiction to grant the relief sought. The prayer is for "specific performance of the said agreement." It was pointed out by Mr. Gibbens that precisely the same result might well have been achieved if the application had been for a mandatory injunction on the defendant to re-erect the fence in accordance with the terms of the contract. In truth, an injunction in that form would have amounted to an order for specific performance of the contract if by that phrase is meant a command of the court upon the defendant to carry out specifically the bargain that was made. I think that important, because to my mind that common term "specific performance" is or may be used in different senses.

With that preface, I turn to the three relevant sections of the County Courts Act, 1934. I take s. 40, first. That is the section which gives general jurisdiction in an ordinary county court action. Its cross heading is "Actions of Contract and Tort," and strictly the word "action" is appropriate only to an action at law. It provides, as is well-known, that the county court has jurisdiction "to hear and determine any "action founded on contract or on tort where the debt, demand "or damage claimed is not more than one hundred pounds." There is a proviso that the county court is not to have jurisdiction in certain classes of case. They include, save as provided elsewhere in the Act, actions in which the title to land is in issue, actions for the recovery of land and also actions for libel, slander, seduction or breach of promise of marriage, which are wholly excluded from the jurisdiction of the county court. Because of that method of defining the jurisdiction, a plaintiff who desires as the chief remedy to obtain an injunction must frame his action as an action for damages and must make it clear that the sum claimed is such as to give jurisdiction to the county court.

It is next necessary to turn to s. 52. The cross heading there, which contrasts with "Actions of Contract and Tort," is "Equity Proceedings," and the purpose of the section is to give to the county court a limited jurisdiction in equity proceedings, the limit being defined in a very different way. That it has to be differently defined is obvious when the first of the equity proceedings is considered, namely, "proceedings "for the administration of the estate of a deceased person." [His Lordship read s. 52, sub-s. 1 (*d*)]. It is to be observed that the general term "property" is used in sub-s. 1 (*d*): the paragraph is not confined to real property, but is in terms confined to contracts for sale or lease.

The argument is that sub-s. 1 (*d*) provides an exhaustive code defining the jurisdiction of the county court in any proceedings which can be properly described as proceedings for specific performance. Mr. Carr points out that the present proceedings for specific performance are not proceedings for the specific performance of the sale or lease of any property. He therefore argues that they are outside the jurisdiction of the county court altogether. That would lead to a somewhat strange result. It would appear capricious that by giving jurisdiction to grant specific performance of some types of contract the statute is preventing a county court judge from ordering the specific performance of any other type of contract. And what I have said as regards specific performance will, of course, apply equally to rectification. Thus, if this argument were right, it would not be possible to obtain in the county court the rectification of a commercial agreement which did not comprehend, or could not be properly described as an agreement for, the "purchase or lease of any property" even though the claim in damages in a suit upon the contract were within the ambit of s. 40.

By s. 52, sub-s. 2, "In all such proceedings as aforesaid the "judge shall, in addition to any other powers and authorities "possessed by him, have all the powers and authorities for the "purposes of this Act of a judge of the Chancery Division "of the High Court." That, of course, gives the county court judge in regard to specific-performance proceedings the same right under Lord Cairns' Act, for example, as a Chancery judge would have in a proceeding in the Chancery courts. I need not refer to sub-s. 3.

Next comes s. 71 headed, "Exercise of Jurisdiction and "Ancillary Jurisdiction." It appears therefore to be directed to the way in which the jurisdiction already conferred can be exercised, and to be giving ancillary jurisdiction. The section

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reads as follows: "Every county court, as regards any "cause of action for the time being within its jurisdiction, "shall in any proceedings before it—(*a*) grant such relief, "redress or remedy or combination of remedies, either absolute "or conditional . . . ."

It seems to me that the capricious result that might arise if s. 52 stood alone and had as a consequence to be construed as Mr. Carr suggests is avoided by reading s. 71 with the sections which precede it. It is by virtue of this section that a county court is empowered in an action for breach of contract to grant an injunction against, it may be, repeated breaches. It therefore seems to me that in any case in which the cause of action is covered by s. 40, the county court can under s. 71 give any remedy that in a similar action in the High Court a High Court judge could give. It seems to me further that if the court can grant an ordinary injunction it can also make a mandatory order. As I have already said, the making of a mandatory order upon a party to do an act which he has contracted to do is, in ordinary language and in common sense, such a "specific performance" as was asked for in this action.

The possible conflict with s. 52 is to my mind resolved by having regard to the fact that s. 52 is directed not to particular remedies but to particular types of proceedings which were well-known and definable in the Chancery court, namely, proceedings for the administration of an estate or for the execution of a trust, proceedings for the dissolution of a partnership or for the specific performance of contracts for sale or lease. For some reason mortgages are not referred to. The phrase "Proceedings for . . . . the sale . . . . of any "property" is clearly intended to relate to the type of proceeding familiar in the old equity court which gave rise to the old and somewhat complex decree for specific performance. Since that type of case is one in which ex hypothesi there would be no sum of damage claimed, it became necessary to provide a different means of defining the jurisdiction. It is for that purpose that reference is made to specific performance proceedings in s. 52.

The general proposition remains that in an ordinary action for breach of contract there is nothing to limit the powers of the court under s. 71, provided that the case is brought within the jurisdiction of the county court by s. 40.

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I have tried to explain the way in which these sections seem to fit in together and, for the reasons I have stated, I think the county court judge had jurisdiction to make an order for specific performance. The appeal should therefore succeed and the necessary order be made.

SOMERVELL L.J. I agree and, although we are differing from the county court judge, there is nothing that I wish to add.

ASQUITH L.J. I also agree.

Appeal allowed.

Solicitors: *Gibson & Weldon, for E. W. B. Whitehead, Newcastle-under-Lyme; Doyle, Devonshire & Co., for Abberley & Walker, Burslem, Stoke-upon-Trent.*

H. C. G.

Reversed. H.L. [1951] 2 All E.R. 473.

Reversed. ST. AUBYN *v.* ATTORNEY-GENERAL [1952] A.C. 15

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Mar. 6, 7, 8, 9, 10 *and* 13; *Apl.* 5.

Evershed M.R. Somervell and Jenkins L.JJ.

Revenue—Estate duty—Tenant for life—Attempt to escape liability for estate duty on death by sale to limited company and subsequent transactions—Finance Act, 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 43, *sub-ss.* 1, 2; *s.* 56, *sub-ss.* 1, 2.

On March 21, 1927, the defendant company was registered under the Companies Acts with a nominal capital of 200,000*l.* At that date certain freehold estates together with investments representing capital money and certain equitable interests were, by the joint effect of a resettlement dated April 26, 1879, and a deed poll dated January 9, 1905, held upon such trusts as the deceased and P. should appoint and in default of appointment in trust for the deceased for life with remainder over. There were trustees for the purposes of the Settled Land Acts. By an agreement dated March 24, 1927, it was agreed that all the freehold property, investments or equitable interests then subject to the resettlement should be sold to the defendant company. The total consideration for the sale was to be 1,700,000*l.* of which 950,000*l.* was to be paid to the trustees in cash and the balance of 750,000*l.* paid to them in forty half-yearly instalments. On the same date the company allotted 100,000 7 per cent preference shares to the deceased at par and 49,993 ordinary shares (making with the seven shares of the signatories of the company's memorandum

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of association allotted at par and held by them as nominees of the trustees 50,000 ordinary shares) to the trustees at a premium of 16*l.* a share. The sale to the defendant company was completed on March 26, 1927. Between March 24 and 29, 1927, the total cash consideration of 950,000*l.* was paid to the trustees who paid thereout the sum of 849,993*l* for the ordinary shares issued to them (making with the 7*l.* paid for the signatories shares a total of 850,000) and the deceased paid to the company 100,000*l.* for 100,000 preference shares. The net result was that the settled property had been converted into 50,000 fully paid ordinary shares, the right to receive from the company 750,000*l.* by forty equal instalments and a sum of 100,000*l.* to be regarded either as in the hands of the trustees or lent to the deceased.

By a deed poll dated March 28, 1927, it was directed that the said sums of 100,000*l.* and 750,000*l.* should be held in trust for the deceased absolutely. By a further deed poll dated May 29, 1927, new trusts were declared as to the property remaining subject to the resettlement by which the life interest of the deceased in the 50,000 ordinary shares was extinguished. The deceased died on November 10, 1940. Estate duty at his death was paid on the principal value of the outstanding instalments of the sum of 750,000*l.* and on the preference shares. The only question was whether it was payable on the 50,000 ordinary shares.

Held, that by the combined effect of s. 43 and s. 56, sub-s. 2, of the Finance Act, 1940, estate duty became payable on the principal value of the 50,000 ordinary shares seeing that s. 56, sub-s. 2, required that the circumstances set out in sub-s. 1 (conveniently termed the statutory hypothesis) were to be assumed. When the statutory hypothesis was applied, it became clear that the determination of the deceased's life interest in the shares did not take effect "to the entire exclusion of the deceased" "and of any benefit to him by contract or otherwise" as required by s. 43, sub-s. 2.

APPEAL from Croom-Johnson J.

The facts, as set out in an information by the Attorney-General having as its object to establish the chargeability of the assets or alternatively the ordinary shares of the defendant company, St. Aubyn Estates Ld., with estate duty on the death of the Second Baron St. Levan (hereafter referred to as the deceased) on November 10, 1940, under and in accordance with ss. 43 and 46 of the Finance Act, 1940, were as follows :—

By a disentailing assurance dated September 24, 1878, the property in the counties of Devon and Cornwall of which the First Baron St. Levan was tenant for life and the deceased tenant in tail in remainder were assured by them (subject to charges which have ceased) to such uses upon such trusts and with and subject to such powers and provisoes, agreements and declarations as they should by any deed or deeds jointly direct or appoint.

By a resettlement dated April 26, 1879, and made between the First Baron of the first part, the deceased of the second part, the Hon. Charles George Cornwallis Eliot and Edward St. Aubyn of the third part, and the said C. G. C. Eliot and James H. W. Drummond of the fourth part, the First Baron and the deceased in exercise of their joint power of appointment appointed the said properties and the First Baron granted certain other freehold properties in Cornwall belonging to him to such uses, upon such trusts and with and subject to such powers, provisoes, agreements and declarations as the First Baron and the deceased should from time to time appoint and in default of and subject to any such appointment and subject to a rent charge of 1,000*l.* which had determined to the use of the First Baron for life and after his decease to the use of the deceased during his life with remainder over. The deed contained a power of sale and exchange exercisable by the parties of the fourth parties with such consent as therein mentioned.

By a deed poll dated January 9, 1903, the First Baron and the deceased in exercise of their joint power of appointment under the resettlement varied the limitations of the resettlement (inter alia) by vesting in the deceased, the Honourable Hugh Amherst (afterwards Lord Amherst) and Sydney Alexander Ponsonby during their joint lives and after the death of either of the last two persons in the survivor and the deceased a joint general power of appointment over all the property comprised in the resettlement exercisable in priority to the life interest of the deceased and all subsequent limitations.

By a deed dated February 21, 1912, and made between the said three persons given a power of appointment by the said deed poll of the one part and the then trustees of the resettlement of the other part, and by a deed poll dated August 3, 1912, under the hands and seals of the said three persons in exercise of the joint power created by the deed poll of January 9, 1905, directions (since revoked as hereinafter stated) were given in relation to the application of capital moneys arising from sales of property comprised in the resettlement and the investments thereof but subject to the like overriding powers of joint appointments as were conferred by the deed poll of January 9, 1903.

The Earl Amherst died in March 7, 1927. At the dates of the several instruments executed in March, 1927, as hereinafter stated, the deceased had no son (and none was afterwards born to him) and the estate next in remainder after his life interest in the settled propertys was (in default of any son) a life interest limited to his nephew, F. C. St. Aubyn, who, besides an eldest son, J. F. A. St. Aubyn, entitled in remainder after him had four younger children contingently entitled to portions chargeable therein. The defendant company, St. Aubyn Estates Ld., was registered under the Companies Acts on March 21, 1927.

By a deed poll dated March 23, 1927, the deceased and the said S. A. Ponsonby, in exercise of the joint power vested in them by the deed poll of January 9, 1905, appointed as an additional mode of investing capital moneys or investments representing capital moneys, any debentures, debenture stock or other securities or any shares or stock of or in the defendant company with power to subscribe for any of these at such premium as the defendant company might require. And in further exercise of the same power it was appointed that there might be a sale of any part of the land comprised in the resettlement in consideration, wholly or partially of a capital sum of money payable by instalments, which should not carry interest if paid on the due dates, and that if land was sold to the defendant company the consideration might consist wholly or partially of fully-paid debentures or debenture stock or other securities or of shares or stock of the company to be vested in the trustees of the resettlement and to be capital moneys in their hands.

By an agreement dated March 24, 1927, and made between the deceased of the first part, the deceased and the said S. A. Ponsonby of the second part and the defendant company of the third part, it was agreed (inter alia):

(1.) that the deceased under his statutory powers as tenant for life and the additional powers given to him by the resettlement and the deed poll of March 23, 1927, should sell and the defendant company purchase as from December 25, 1926, all the freehold lands then subject to the resettlement:

(2.) that the deceased and the said S. A. Ponsonby in exercise of their joint power under the resettlement should direct the sale and transfer or assignment to the defendant company of the investments therein mentioned (being the investments then representing capital moneys under the resettlement) and also of all the equitable shares, interests and rights then subsisting in respect of undivided shares of land which before January 1, 1926, were subject to or comprised in the resettlement:

(5.) that the consideration for the sale of the said lands should be 1,117,000*l.*, which should be paid and satisfied as to 367,000*l.* by payment to the trustees in cash upon the completion of the sale and as to 750,000*l.* by payment to the trustees in cash by 40 half-yearly instalments of 18,750*l* each payable on June 24 and December 25 in every year, the first payment to be made on June 24 then next. No interim interest was to be payable in respect of the part of the sum of 750,000*l.* unpaid except if any instalment should be in arrear for more than 21 days when interest would be payable at 5 per cent. per annum from the day it fell due:

(6.) that the consideration for the sale of the investments mentioned in the second clause should be 573,000*l.* to be apportioned between the investments according to their respective values and from the sale of the said equitable shares, interests and rights to the sum of 10,000*l.*, such sum to be satisfied by payment in cash on completion:

(11.) that completion should take place on March 26, 1927. The sum of 367,000*l.*, 573,000*l.* and 10,000*l.* together, made a total cash purchase consideration of 950,000*l.*

On the same day (March 24, 1927) the defendant company allotted 100,000 cumulative 7 per cent. preference shares of 1*l.* each at par to the deceased and 49,993 ordinary shares of 1*l.* each, making with 7 shares allotted to the subscribers to the Memorandum of Association a total of 50,000 at a premium of 16*l.* per share to the trustees of the resettlement. The preference shares carried a right to preferential repayment in a winding up of the capital paid up and all arrears of dividend.

By a deed dated March 25, 1927, and made between the deceased and the said S. A. Ponsonby of the one part and the trustees of the resettlement of the other part, the parties of the first part in exercise of their joint power revoked all the provisions of the deed of February 21, 1912, and the deed poll of August 3, 1912, and appointed that all the moneys and investments to which the same related should thenceforth go and devolve and be held as if the sum were capital money or investments representing capital money arising under the Settled Land Act, 1925, from settled land comprised in the St. Aubyn settlement (by which was meant the resettlement and several instruments of later date), and should be held in trust accordingly. And by the same deed the deceased purported as tenant for life to direct, and the deceased and the said S. A. Ponsonby in exercise of their powers of appointment purporting to act by way of ratification of the said direction appointed and directed that all capital money or investments representing capital money then subject to the St. Aubyn settlement (including the money and investments thereinbefore directed to be held as capital money and investments representing capital money) should forthwith be invested in or exchanged for ordinary shares of the defendant company, and they directed the trustees to invest and exchange the same accordingly, the shares to be subscribed for or taken at the premium required by the defendant company.

On March 26, 1927 (or as to the investments shortly afterwards) the freehold property and investments and equitable shares comprised in the agreement of March 24, 1927, were respectively conveyed and transferred to the defendant company by the deceased and the said trustees respectively.

By a deed poll dated March 28, 1927, the deceased and the said S. A. Ponsonby in expressed exercise of their power of appointment jointly directed and appointed that the sum of 100,000*l.*, part of a sum of 950,000*l.* cash stated to be in the hands of the trustees of the resettlement and the sum of 750,000*l.* payable by the defendant company by the instalments already mentioned and the successive instalments thereof and any interest which might become payable in respect of any instalment should be in trust for the deceased absolutely and he should be entitled thereto for his own sole use.

In the information it was alleged that this sum of 950,000*l.* was not in fact in the hands of the trustees but in an answer to this it was alleged that the sum of 950,000*l.* was paid by the defendant company to the trustees by means of a cheque on the defendant company's bankers from whom an advance had been obtained for the purpose and was in the hands of the trustees on March 28, 1927, or shortly afterwards.

By a deed poll dated March 29, 1927, the deceased and the said S. A. Ponsonby recited that the property then subject to the resettlement consisted of 49,993 ordinary shares of 1*l.* each of the defendant company, and exercised their joint power of appointment under the resettlement and all other powers thereto enabling them by appointments to the following effect, namely :—

(1.) A life annuity of 5*l*. was charged on the income of the resettlement in favour of the said F. C. St. Aubyn.

(2.) In the next place (subject to a discretionery power exercisable only after the death of the deceased in favour of the holder for the time being of the Barony of St. Levan) the trustees of the resettlement were to accumulate the income of the settled property for 20 years for providing portions contingently charged thereon for the younger children of the said F. C. St. Aubyn, such period to determine if no portion should vest absolutely or if the portions should be fully provided for within the period.

(3.) On the expiration or sooner determination of the term, the property was to be held in trust for such issue of the First Baron (other than the deceased) as the deceased should by deed appoint and subject thereto upon the three subsisting trusts and the powers and provisions then subsisting under the resettlements if the said deed poll had never been executed.

(4.) The trustees were to use their voting powers as holders of the ordinary shares of the company to prevent the distribution of dividends in excess of the above annuity and 2,000*l*. a year for the accumulation of portions, and after the death of the deceased any sums required for exercising the discretionary powers in favour of the holder for the time being of the Baronetcy and to cause any further income of the defendant company to be capitalized against issues to the trustees of shares or debentures to be held as capital money.

(5.) Subject thereto the joint powers were released. The cash purchase price of 950,000*l*. was applied in acquiring or was treated as satisfied by 100,000 preference shares, as to the 100,000*l*. appointed to the deceased by the deed of March 28, 1927, and by 50,000 ordinary shares allotted to the trust as to the balance of 850,000*l*. The said preference and ordinary shares together with the sums payable in cash by 40 half-yearly instalments constituted the purchase price for the lands and investments transferred to the company pursuant to the agreement of March 24, 1927.

A number of matters were alleged in the information but denied by the defendants to the information, namely :—

(1.) That the instruments dated March 23, 24, 25, 28 and 29, 1927, all effected associated operations within the meaning of the Finance Act, 1940, s. 59, all of which affected the property which on March 23, 1927, was subject to the resettlement or property directly representing that property or income arising therefrom ;

(2.) that every such operation formed part of a single scheme and was effected with reference to all the others ;

(3.) that the sale to the defendant company was effected with a view to enabling or facilitating the operations effected by the two deeds of March 28 and 29, 1927, whereby a sum of 100,000*l.* and a series of instalments of purchase money payable by the company were allocated to the deceased in exchange for the extinction of his life interest under the resettlement ; that the defendant company was consequently " concerned " in the determination of the life interest within the Finance Act, 1940, s. 56, sub-s. 2 and the provisions of that section were applicable to the case with the result that the shares of the defendant company became liable to estate duty on the death of the deceased under s. 43, sub-s. 1 (1) of

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(1) The Finance Act, 1940, s. 43, sub-s. 1 : " Subject to the " provisions of this section, where " an interest limited to cease on " a death has been disposed of " or has determined, whether by " surrender, assurance, divesting, " forfeiture, or in any other " manner (except by the " expiration of a fixed period at " the expiration of which the " interest was limited to cease), " whether wholly or partly, and " whether for value or not, after " becoming an interest in possession, (*a*) if apart from the disposition or determination the " property in which the interest " subsisted would have passed on " the death under s. 1 of the " Finance Act, 1894, that property " shall be deemed by virtue of " this section to be included as " to the whole thereof in the " property passing on the death " . . . ."

Sub-section 2 : Where the " relevant disposition or determination was bona fide " effected or suffered three years " before the death . . . . the " preceding sub-section shall not " have effect : (*a*) if bona fide " possession and enjoyment of " the property in which the " interest subsisted was assumed " immediately thereafter by the " person becoming entitled by " virtue of or upon the disposition " or determination and thenceforward retained to the entire " exclusion of the person who " had the interest and of any " benefit to him by contract or " otherwise ; or (*b*) in the case " of a partial determination, if " the conditions specified in the " preceding paragraph were not " satisfied by reason only of the " retention or enjoyment by the " deceased of possession of some " part of the property, or of " some benefit, by virtue of the " provisions of the instrument " under which he had the interest: " Provided that nothing in " this sub-section shall be construed as affecting any charge " of estate duty, arising otherwise " than by virtue of the provisions " of the preceding subsection."

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the Act and were not exempted by the operation of sub-s. 2 thereof.

In the information it was also alleged (and denied by the defendants) that if the assets of the company had been held by it on trust for its members as defined by s. 59 of the Act in the manner provided by s. 56, the life interest of the deceased immediately before the deed of March 28, 1927, would have been a life interest in the company's assets and, notwithstanding the extinction of his life interest, the assets would have remained during the rest of his life subject to trusts for his benefit corresponding with the rights conferred by the holding of the preference shares and by the instalments of deferred purchase money for the time being outstanding so that the conditions necessary for exempting the assets from estate duty on his death would not have existed.

It was alleged further (and denied by the defendants) that in the circumstances the conditions specified in s.43, sub-s. 2 of the Act as to the entire exclusion of the deceased and of any benefit to him must be treated as unsatisfied and the ordinary shares held by the first four defendants as the present trustees of the resettlement became subject to estate duty under sub-s. 1 of that section.

Alternatively, it was alleged that the defendant company was a company to which s. 46 of the Act of 1940 applied and that under that section the assets of the company became liable to estate duty on the death of the deceased.

The defendants denied that any liability to estate duty attached on the death of the deceased either to the ordinary shares of the company held by the defendant trustees or to the assets of the defendant company. Estate duty had been paid on the principle value of the outstanding instalments of the sum of 750,000*l* and on the preference shares.

Since the commencement of the action, the defendant company had gone into liquidation and the defendant trustees had received from the liquidator and others a part of the defendant company's assets.

The informant's claim on behalf of His Majesty was (1.) that it might be declared that on the death of the deceased, estate duty became payable under s. 43 of the Finance Act, 1940, by the defendant trustees in respect of the principal value of the ordinary shares of the defendant company held by the four first named defendants. (2.) Alternatively that estate duty became payable by the defendant company under s. 46

of the Act in respect of its assets; and payment of estate duty accordingly was asked for.

Croom-Johnson J. dismissed the Crown's claim and the Attorney-General appealed.

Sir Frank Soskice S.-G., *Gerald Upjohn K.C.*, and *J. H. Stamp* for the Attorney-General.

Sir Andrew Clark K.C. and *Norman C. Armitage* for the defendants.

Cur. adv. vult.

April 5. JENKINS L.J., read the judgment of the court. In this case estate duty is claimed by the Crown to have become payable on the death on November 10, 1940, of John Townshend Second Baron St. Levan (whom we will call "the deceased") either (i.) under s. 43, if and so far as necessary supplemented by s. 56, sub-s. 2 of the Finance Act, 1940, on the principal value (ascertained in accordance with s. 55, sub-s. 2 of the same Act) of the ordinary shares of the defendant company; or alternatively (ii.) under s. 46 of that Act on a proportion of the assets of the defendant company valued in accordance with s. 50 and subject to the provisions against duplication of charge contained in s. 51, sub-s. 2. The Solicitor-General on behalf of the Crown, while not admitting that the two claims are not capable in principle of cumulative application, concedes that they should be treated as alternatives for the purposes of the present case.

By his judgment dated May 20, 1949, Croom-Johnson J. rejected both claims and dismissed the information and from that judgment the Crown now appeals. We will deal first with the claim under ss. 43 and 56, sub-s. 2 of the Act.

It is unnecessary to repeat what was said in the judgment of this court in *Attorney-General* v. *St. Aubyn* (1), about the history of this legislation. It will, however, be convenient to begin by setting out the relevant provisions of the two sections.

[His Lordship read s. 43, sub-s. 1 (*a*), sub-s. 2 (*a*) and (*b*), and sub-s. 6, and also s. 56, sub-s. 1, and continued:] Section 56, sub-s. 2 provides as follows: "Where a company "to which this section applies was concerned in the disposition "or determination of an interest limited to cease on a death "effected or suffered as mentioned in sub-s. 2 of s. 43 of this "Act, or in a surrender made as mentioned in sub-s. 3 of s. 48

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(1) See judgment of Dec. 19, 1949, set out in a note at end of this report.

" of this Act, or was concerned in any one or more of associated " operations of which the disposition or determination or " surrender formed one, the conditions as to the entire exclusion " of the person who had the interest or of the deceased, and " of any benefit to him, specified in the said sub-s. 2 or in the " said sub-s. 3 as the case may be, shall be treated as having " been satisfied if and only if they would have been so " treated in the circumstances aforesaid." The " circumstances aforesaid " referred to in s. 56, sub-s. 2 are defined in sub-s. 1 of the same section as : " the following circumstances " namely, if the assets of the company had been held by " it on trust for the members thereof and any other person " to whom it is under any liability incurred otherwise than " for the purposes of the business of the company wholly " and exclusively, in accordance with the rights attaching " to the shares in and debentures of the company and the " terms on which any such liability was incurred, and if the " company had acted in the capacity of a trustee only with " power to carry on the business of the company and to employ " the assets of the company therein."

Reference should also be made to the definitions of the terms " associated operations " and " disposition " contained in s. 59, which are in these terms : " ' Associated operations ' " means any two or more operations of any kind being,— " (*a*) operations which affect the same property, or one of " which affects some property and the other or others of which " affect property which represents, whether directly or " indirectly, that property, or income arising from that " property, or any property representing accumulations of any " such income ; or (*b*) any two operations of which one is " effected with reference to the other, or with a view to " enabling it to be effected or to facilitating its being effected, " and any third operation having a like relation to either of " those two, and any fourth operation having a like relation " to any of those three, and so on ; whether those operations " are effected by the same person or by different persons, " whether they are connected otherwise than as aforesaid or " not, and whether they are contemporaneous or any of them " precedes or follows any other."

" ' Disposition ' includes any trust, covenant, agreement " or arrangement, whether made by a single operation or by " associated operations, and also, in relation to shares in or

" debentures of a company, the extinguishment or any altera-" tion of rights attaching thereto, whether effected by a single " operation or by associated operations."

[His Lordship stated the facts and the effect of the deed poll of March 23, 1927, and the agreement of March 24, 1927, and continued :]

The total consideration for the sale to the defendant company was thus to be 1,700,000*l.*, of which 950,000*l.* was to be paid to the trustees in cash on completion of the sale, and the balance of 750,000*l.* was to be paid to the trustees by 40 half-yearly instalments of 18,750*l.* on the dates and in the manner above stated.

On the same date (that is March 24, 1927) the defendant company allotted 100,000 7 per cent. cumulative preference shares to the deceased at par and 49,993 ordinary shares (making with the seven shares allotted to the subscribers to the memorandum of association a total of 50,000 issued ordinary shares) to the trustees at a premium of 16*l.* per share.

By a deed dated March 25, 1927 (so far as material for the present purpose) the deceased as tenant for life directed and the deceased and S. A. Ponsonby in exercise of their joint general power of appointment by way of ratification of such direction appointed and directed that all capital money or investments representing capital money then subject to the resettlement should forthwith be invested in or exchanged for ordinary shares of the defendant company which might be subscribed for or taken at the premium required by the defendant company for the same.

The sale to the defendant company was completed on March 26, 1927 (*a*) as regards the freehold properties by a conveyance of that date made between the deceased (who conveyed under his statutory and additional powers as tenant for life) of the first part, the deceased and S. A. Ponsonby (who ratified and confirmed that conveyance in exercise of their joint general power of appointment) of the second part, the trustees (who acknowledged receipt of the 367,000*l.* immediately payable by the defendant company and took a covenant from the defendant company for payment of the balance of 750,000*l.* by the instalments and in the manner mentioned above) of the third part, and the defendant company (as purchaser) of the fourth part ; and (*b*) as regards the equitable interests by a conveyance of the same date between the trustees (as vendors for the sum of 10,000*l.*, of which they thereby acknowledged receipt) of the first part, the deceased (directing the transaction as tenant for life) of the second part, the deceased and S. A. Ponsonby (confirming the transaction in exercise of their joint general power) of the third part, and the defendant company (as purchaser) of the fourth part. It is to be assumed that the investments representing capital moneys (sold to the defendant company for the aggregate consideration of 573,000*l.*) were on or about the same date transferred to the defendant company by appropriate separate instruments.

Between March 24 and 29, 1927, the total cash consideration of 950,000*l.* immediately payable by the defendant company to the trustees was paid by means of a cheque drawn by the defendant company in favour of the trustees against an advance made by its bankers for the purpose ; and the trustees paid to the defendant company by cheque the sum of 849,993*l.* for the 49,993 ordinary shares of the defendant company allotted to them, making with the seven subscribers' shares taken for cash at par a total of 850,000*l.* paid to the defendant company by the trustees for 50,000 ordinary shares at an overall premium of 16*l.* per share ; and the deceased paid the defendant company by cheque the sum of 100,000*l.* for the 100,000 preference shares of the defendant company allotted to him at par, having been put in funds for this purpose by means of a cheque for the like amount drawn in his favour by the trustees. It is not clear whether the last-mentioned cheque represented moneys due to the deceased on income account or was drawn in his favour in anticipation of the appointment of March 28, 1927, mentioned below. At all events the 100,000*l.* paid by the deceased for the preference shares if and so far as it represented an advance by the trustees was offset, and if and so far as it represented moneys to which he was already entitled, was recouped to him, by means of that appointment.

The net result of the transactions so far described was that the freehold property, equitable interests, and investments of capital money formerly subject to the resettlement had been converted into 50,000 fully-paid ordinary shares of the defendant company, the right to receive from the defendant company a capital sum of 750,000*l.* by 40 half-yearly instalments of 18,750*l.*, each payable on the half-yearly dates abovementioned and carrying no interest unless and until twenty-one days or more in arrear, and a sum of 100,000*l.* to be regarded either as being in the hands of the trustees or else as outstanding on a temporary loan made by them to the deceased to enable him to pay for his 100,000 preference shares.

By a deed poll dated March 28, 1927, the deceased and S. A. Ponsonby, jointly directed and appointed that the said sum of 100,000*l.* and the said sum of 750,000*l.* payable by the defendant company by the instalments aforesaid and the successive instalments thereof and any interest which might become payable in respect of any instalment should be in trust for the deceased absolutely and he should be entitled thereto for his own sole use instead of for his life only.

By a further deed poll dated March 29, 1927, the deceased and Ponsonby after recitals including a recital to the effect that all the lands and hereditaments subject to the resettlement had been sold and that the property then subject thereto consisted of 49,993 fully-paid ordinary shares of 1*l.* each in the defendant company (no specific mention being made of the seven shares taken by the subscribers to the memorandum of association though these did in fact clearly form part of the settled property) the deceased and Ponsonby in exercise of their joint general power of appointment appointed new trusts of (in effect) the whole of the property then remaining subject to the resettlement (that is in view of the appointment of the previous day the 50,000 issued ordinary shares of the defendant company) and released their joint general power of appointment. It is unnecessary for the present purpose to state in detail the somewhat complicated terms of the new trusts so declared, which admittedly had the effect of extinguishing the life interest of the deceased in the 50,000 ordinary shares and of excluding him from all benefit so far as those shares and the income thereof was concerned. In brief outline, the trusts in question included: (i.) A trust for payment to the deceased's nephew Francis Cecil St. Aubyn of an immediate life annuity of 5*l.*, and subject thereto; (ii.) A trust for the accumulation of the income of the settled property for a period of twenty years (determinable as therein mentioned) for providing the portions contingently charged thereon for the younger children of such nephew; and (iii.) Provisions to the effect that no beneficiary was to be entitled to possession of the settled property during such period, and that on its expiration or sooner determination the property was to be held in trust for such issue of the deceased's father the First Baron St. Levan (other than the deceased himself) as the deceased should appoint and in default of and subject to any such appointment upon the trusts which upon the expiration or sooner determination of such period would be subsisting under the resettlement if the deed poll now in statement had never been executed and the deceased had died immediately before such execution.

Notwithstanding the provision under which no beneficiary was to be entitled to possession of the settled property during the period of accumulation, it was conceded on behalf of the Crown that the trustees should be regarded for the purposes of s. 43, sub-s. 2 (*a*) as having assumed possession and enjoyment of the 50.000 shares upon the determination by the deed poll of March 29, 1927, of the deceased's life interest therein. This point being thus disposed of, it follows that as the deceased survived the execution of the last-mentioned deed by more than three years all the conditions of the exemption from liability to duty under s. 43, sub-s. 1, afforded by sub-s. 2 (*a*) of the same section would be satisfied if the appointment thereby made was the only disposition to be considered and the 50,000 ordinary shares were the only property to be taken into account. It is, however, contended on the part of the Crown that, although the deceased received no benefit out of the ordinary shares or the income thereof, he nevertheless was not excluded from " any benefit to him by contract " or otherwise " as required by s. 43, sub-s. 2 (*a*) inasmuch as he did receive a benefit in the shape of the right to receive the 40 half-yearly instalments of 18,750*l.* each which had been vested in him absolutely by the deed of March 28, 1927. In support of this contention reference was made to *Attorney-General* v. *Worrall* (1), as authority for the proposition (which we fully accept) that the benefit relied on as a bar to exemption need not necessarily be carved out of the property in which the determined life interest subsisted. The Solicitor-General argued that the Crown was entitled to succeed on this ground even under s. 43 alone and unaided by s. 56, sub-s. 2. We are by no means satisfied that this is so. It is no doubt true that each of the steps taken in March, 1927, formed part of one pre-arranged scheme and was taken with a view to the carrying out of that scheme. Sir Andrew Clark very properly admitted this perfectly obvious fact. It is also hardly open to doubt that the scheme was framed in the form it took with a view to avoiding the liability to duty on the death of the

(1) [1895] 1 Q. B. 99.

deceased which would (even as the law then stood) have been likely to arise if, without the preliminary expedient of a sale to a company formed for the purpose, a substantially similar provision had been made for the deceased directly out of the settled property, and subject thereto his life interest in that property had been extinguished. Nevertheless, there is nothing unlawful in a scheme designed to minimize the incidence of duty by legal means, and its success or failure must be judged by reference to the true legal effect of what has been done: see *Commissioners of Inland Revenue* v. *Duke of Westminster* (1). Thus in the present case the sale to the defendant company must, apart from s. 56, sub-s. 2, be given its true legal effect and so considered the result of it in conjunction with the trustees' subscription for ordinary shares was to convert the settled property into 50,000 ordinary shares of the defendant company, a capital sum of 750,000*l*. payable by the defendant company to the trustees by instalments, and a further capital sum of 100,000*l*. Thenceforward these assets and these alone constituted the settled fund. Under the deeds of March 28 and 29, 1927, the deceased took absolutely the 750,000*l*. and the 100,000*l*., and his interest in the 50,000 ordinary shares was absolutely extinguished. The deceased having survived the transactions by more than three years it is difficult to see how under s. 43 alone the enlargement of his life interest in the 750,000*l*. and the 100,000*l*. (part of the capital of the settled fund) constituted a reservation of a benefit to him so as to prevent the exemption afforded by sub-s. 2 (*a*) from applying. If the 750,000*l* had been payable in a lump sum and not by instalments, the case would have been equivalent to the simple one of the assignment by a remainderman to a tenant for life of the reversion in part of a settled fund in consideration of the surrender by the tenant for life to the remainderman of his life interest in the remaining part of the fund.

It is not contended by the Crown that the simple transaction I have instanced would attract duty given survival by the life tenant for the prescribed statutory period; and indeed it would otherwise be hard to see how any surrender of a life interest for value could escape duty at any distance of time, though the section clearly contemplates that a surrender for value is capable of qualifying for exemption under sub-s. 2. The only difference in the present case is that the capital

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(8) [1936] A. C. 1.

assets taken absolutely by the tenant for life consisted chiefly of a debt payable by instalments. We find it difficult to see how this can alter the character of the transaction or affect the result unless the legal effect of the sale to the defendant company can be disregarded, which there is no warrant for doing independently of s. 56, sub-s. 2.

However, it is unnecessary to take up time in considering what the position might be if s. 56, sub-s. 2 did not apply, as the respondents admit that this sub-section is in fact applicable, the defendant company being, under the definition provided by s. 58, a company to which s. 56 applies, and having been concerned in an "associated operation" in the shape of the sale and transfer to it of the settled property. Section 56 sub-s. 2, which we have already quoted at length, requires the assumption of certain circumstances set out in sub-s. 1, and also fully quoted above. The circumstances thus required to be assumed have been conveniently termed "the statutory hypothesis." The effect of the application of the statutory hypothesis in the present case is, as we understand it, to eliminate completely the element of sale from the transfer to the defendant company and the consequent conversion of the settled property, and to make the case stand for the purposes of s. 43, sub-s. 2, as it would have stood if the settled property had been transferred to the company as a trustee upon the following trusts: (i.) To pay thereout to the trustees of the settlement 750,000*l.* by the instalments and on the dates hereinbefore mentioned to be held by them as capital moneys on trust for the deceased for life with remainder-over as in the resettlement provided; (ii.) Subject as aforesaid to raise and pay thereout to the deceased, on whatever future event should be taken as corresponding for the purposes of the hypothetical trusts to the winding up of the company, 100,000*l.*, and in the meantime to pay him interest on that sum at the rate of 7 per cent. per annum out of the net income of the property; (iii.) Subject as aforesaid upon trust both as to income and (on the event taken as corresponding to such winding up) capital for the trustees of the settlement absolutely upon the trusts for the deceased for life with remainders over applicable to income and capital respectively under the resettlement.

It will thus be seen that the application of the statutory hypothesis results in the conversion of the right to receive the instalments of the 750,000*l.* into an equitable interest charged by way of primary trust on the entire capital and income of the settled property as it stood before the sale to the defendant company. It follows that the appointment to the deceased absolutely of the right to receive the 40 half-yearly instalments of the 750,000*l.* effected by the deed of March 28, 1927, must by virtue of the statutory hypothesis be regarded for the purposes of s. 43, sub-s. 2, as an appointment to him absolutely of an equitable interest of the nature above described in the settled property as it stood before the sale to the defendant company, and not of a separate and distinct capital asset consisting of the right to receive the instalments from the defendant company. It also follows that the appointment of March 29, 1927, by which the deceased's life interest in the 50,000 ordinary shares of the defendant company was extinguished must be considered as an appointment extinguishing his life interest, not in the 50,000 ordinary shares as a separate and distinct capital asset, but in the equitable interest in the settled property as it stood before the sale to the defendant company which the statutory hypothesis imputes to the trustees of the settlement as holders of the ordinary shares, that is to say, the entire equitable interest in the settled property as it stood before the sale to the defendant company subject to (i.) the primary trust for payment thereout of the instalments of the 750,000*l.*; and (ii.) the trust for payment to the deceased of the 100,000*l.* with interest in the meantime payable out of income at the rate of 7 per cent. per annum substituted by the statutory hypothesis for his holding of preference shares.

Sir Andrew Clark for the respondents admits that the statutory hypothesis is applicable, and also, we think, substantially accepts the effect of its application as above described, except that he divides the interests to be imputed to the deceased in respect of the 100,000 preference shares and to the trustees in respect of the 50,000 ordinary shares into trusts of income pending the winding up of the defendant company, and of capital upon the defendant company being wound up. On the footing that the company is to be considered as a trustee of the property, we find difficulty in regarding its winding up, as such, as an event having any relevance to the terms of the hypothetical trusts. Looking, however, at the voting rights attached to the shares, we find that under art. 48 of the defendant company's articles of association a poll may be demanded by any member present in person or by proxy, and that under art. 52, on a show of hands, every member present in person has one vote, and on a poll every member has one vote for each share of which he is the holder, the voting rights attached to the preference shares being restricted to certain specified matters which, however, include a resolution for the winding up of the company.

It follows that as the trustees and their nominees held 50,000 ordinary shares carrying on a poll a like number of votes, while the deceased held 100,000 shares carrying on a poll a like number of votes with respect to a resolution for winding up the defendant company, a resolution for that purpose could have been carried if, but not unless, it was concurred in by the trustees and the deceased. Translating this into the nearest equivalent we can suggest for the purposes of the hypothetical trust, we think the capital sum of 100,000*l.* corresponding to the deceased's capital rights in respect of the 100,000 preference shares should be considered as payable to him at the joint request of the trustees and the deceased, and that the interest corresponding to the trustees' capital rights in respect of the 50,000 ordinary shares—that is to say, the residue of the corpus of the settled property remaining after provision for the half-yearly instalments of the 750,000*l.*, and for the deceased's equitable interest corresponding to the 100,000 preference shares—should be considered as transferable to them on the like joint request. We do not, however, regard the precise event upon which the corpus of the settled property remaining after provision for the instalments of the 750,000*l.* is to be considered as payable or transferable to the trustees and the deceased according to their respective interests under the hypothetical trusts as having any material bearing on the result. The substantial effect of applying the statutory hypothesis is to impute to the deceased the following equitable interests in the property immediately before the execution of the deed of March 28, 1927, namely, (i.) a life interest in the 40 half-yearly instalments of 18,750*l.* each charged by way of trust on the whole of the settled property, (ii.) an absolute interest in 100,000*l.* raisable thereout with interest in the meantime at the rate of 7 per cent. per annum (i.e. 7,000*l.* per annum) payable out of income; and (iii.) a life interest in the residue of the settled property.

Sir Andrew Clark has forcibly argued that even so the claim under ss. 43 and 56 (2.) must fail. His contention is to the effect that even when the statutory hypothesis is applied all it does is to create three separate and distinct interests in the settled property, viz. (i.) the trust to raise and pay to the trustees the 40 half-yearly instalments of 18,750*l.* each to be held by them upon trust for the deceased for life with remainders over, (ii.) the trust to raise and pay to the deceased a capital sum of 100,000*l.* and in the meantime to pay him 7,000*l.* per annum out of income, and (iii.) the trust of the residue of the property for the trustees in trust for the deceased for life with remainders over; all these three interests being subject to the overriding joint general power of appointment. By the deed of March 28, 1927, the joint general power was exercised so as to enlarge the deceased's life interest in the 40 half-yearly instalments of 18,750*l.* each into an absolute interest. He already had an absolute interest in the 100,000*l.* when raised and the 7,000*l.* per annum payable out of income until it was raised, though the cost of such interest was ultimately provided by means of the appointment to him absolutely of the sum of 100,000*l.* effected by the same deed. There remained the third separate and distinct interest, that is to say the residue of the settled property remaining after provision for the other two, which after the execution of the deed of March 28 was the only property remaining subject to the trusts of the resettlement. This residue alone (so it is argued) was the subject of the deed of March 29, 1927, and the relevant disposition for the present purpose was the determination of the deceased's life interest in such residue effected by that deed. *Quoad* such residue, says Sir Andrew in effect, the determination of the deceased's life interest was complete, and the deceased was wholly excluded from all benefit out of or in respect of it. The absolute interest taken by the deceased in the 40 half-yearly instalments under the deed of March 28, 1927, and the interest imputed to him by virtue of his holding of preference shares are (so proceeds the argument) irrelevant for this purpose. These, it is said, were separate and distinct interests forming no part of the subject matter of the relevant disposition, or in other words of "the "property in which the interest subsisted" within the meaning of s. 43 (2.), and the deceased held them as separate and distinct items of property his title to which was complete before the date of and in no way referable to the relevant disposition, i.e. the deed of March 29, which simply determined his life interest in a third separate and distinct item of property.

We find it impossible to accept the respondents' argument. We propose for simplicity's sake to ignore the interest imputed to the deceased under the statutory hypothesis by virtue of his ownership of the 100,000 preference shares, in view of the unsatisfactory state of the evidence as to the precise manner in which the 100,000*l.* paid for these shares was originally provided, and to deal with the matter on the footing that the only interest taken by the deceased to be regarded relevant to the question of exemption under s. 43 (2.) is the right to receive the 40 half-yearly instalments of 18,750*l.* each, converted by the application of the statutory hypothesis into a trust for payment of those instalments out of the settled property as it stood before the sale to the defendant company. This interest as so converted was in its very nature essentially an interest taking effect out of and as it were permeating every part of the settled property. It was, moreover, admittedly created in order that it might be vested in the deceased as a preliminary to the determination of the deceased's interest in the residue of the settled property, which must for this purpose be treated, by virtue of the statutory hypothesis, as substituted for the 50,000 ordinary shares of the company. Furthermore, the deceased's interest in it was enlarged into an absolute interest the very day before his life interest in the residue of the settled property was determined, admittedly in order that after that determination the deceased might nevertheless be entitled to receive half-yearly out of the settled property the sum of 18,750*l.* for a period of twenty years. Once the statutory hypothesis is applied, we see no escape for the respondents from the conclusion that the determination of the deceased's life interest did not take effect " to the entire exclusion " of the deceased " and of any benefit to him by contract or other- " wise " as required by s. 43, sub-s. 2, inasmuch as he did retain a benefit in the shape of the right to receive the 40 half-yearly instalments of 18,750*l*. each, which benefit continued down to the date of his death, and was even then not exhausted. We think that for this purpose "the property in which the "interest subsisted" within the meaning of s. 43, sub-s. 2 (*a*) must be taken as being the settled property as it stood before the sale to the company, the subsequent creation of the different equitable interests which the statutory hypothesis supposes being merely in the nature of a preliminary carving up of the property into the appropriate beneficial interests with a view to securing the desired benefit to the deceased out of it upon the intended determination of his life interest.

But even if we are wrong in this, and "the property in which "the interest subsisted" must, as Sir Andrew contended, be considered as consisting only of the residue of the property remaining after provision for the other interests, we are satisfied that the benefit taken by the deceased in the shape of the creation and vesting in him of the right to receive the half-yearly instalments, though on this view not taking effect out of the "property in which the interest subsisted," was on the facts so clearly referable to and connected with the determination of the deceased's life interest in that property as to constitute a fatal objection to exemption under s. 43, sub-s. 2. Sir Andrew Clark placed some reliance on the Irish case of *In re Cochrane* (1), and on the Privy Council cases of *Munro* v. *Commissioner of Stamp Duties* (2) and *Commissioner for Stamp Duties of New South Wales* v. *Perpetual Trustee Company Ld.* (3), in support of his argument to the effect that the mere retention of a previously existing interest in property outside the subject matter of the relevant gift or disposition does not constitute a relevant benefit for the purposes of provisions such as those of s. 43. None of these cases seems to us to have the faintest resemblance to the present case, and we can derive no assistance from any of them. It is one thing to hold (for instance) that a man who settles property upon trusts which confer no benefit on himself, but do not or may not exhaust the whole beneficial interest in the property settled, and thus retains, subject to those trusts, some residual vested or contingent resulting or reversionary interest in the property, has nevertheless—to the extent of the beneficial interests taking effect under those trusts—made a complete disposition to the entire exclusion of himself and of any benefit to him by contract or otherwise. It is quite another thing to hold, and we decline to agree, that a similar entire exclusion is achieved if (for instance) a man who has a general overriding power of appointment over property settled on himself for life with remainders over creates, in exercise of the power, an annuity payable to himself in priority to his life interest for a term of twenty years certain, and then releases the power and surrenders his life interest subject to the annuity; or (which comes to the same thing) appoints by way of final exercise of the power that subject to the annuity the property shall be held on trusts which have the effect of extinguishing his life interest.

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(1) [1906] 2 I. R. 200.

(2) [1934] A. C. 61.

(3) [1943] A. C. 425.

Sir Andrew Clark also placed some reliance on *Attorney-General* v. *Seccombe* (1). That is the well-known case in which it was held that for the purposes of s. 11, sub-s. 1 of the Customs and Inland Revenue Act, 1889 (relating to gifts inter vivos) as applied to estate duty by s. 2, sub-s. 1 (*c*) of the Finance Act, 1894, the words "or otherwise" in the phrase "or of any "benefit to him by contract or otherwise" must be read as meaning some arrangement ejusdem generis with contract, that is to say, an enforceable arrangement. Sir Andrew sought to apply that decision to the present case in this way: There was (he said in effect) no contractual nexus between the various steps here carried out. Thus the execution of the deed of March 28, 1927, which gave the deceased the absolute interest in the instalments, imposed no obligation on the appointors to execute the deed of March 29, 1927, which determined the deceased's life interest in the ordinary shares of the defendant company, or the corresponding interest in the settled property substituted by the statutory hypothesis for those ordinary shares. Thus, he argued, there was no legally enforceable arrangement under which the deceased took the instalments in exchange for the determination of the life interest. We think that this places upon the decision in *Attorney-General* v. *Seccombe* (1) a construction which it will

(1) [1911] 2 K. B. 688.

not well bear. The decision, as we understand it, goes no further than to hold that the benefit must be secured by some legally enforceable arrangement as opposed to being merely casual or eleemosynary. That may be so, but it does not follow that the right to the benefit must be contractually connected with the disposition. In our judgment it is quite enough if it appears on the facts that the benefit is conferred or reserved with a view to, or on account of, the gift or disposition, or in other words that the one is referable to the other.

For the reasons above stated we are, therefore, of opinion that the claim for duty under s. 43 in conjunction with s. 56, sub-s. 2 of the Finance Act, 1940, should succeed. The learned judge held that the claim under s. 43 could not succeed without the aid of s. 56, sub-s. 2, and so far we are not disposed to differ from him, though we have not found it necessary to express any concluded opinion on the position as it might have been if s. 56, sub-s. 2 had not been enacted. But he also found himself able to hold, for reasons which we have found a little difficult to follow, that even with the aid of s. 56, sub-s. 2, the claim could not be made out. In so holding we think that the learned judge was in error. The terms of s. 56, sub-s. 2 are far from being a model of clarity, and they demand a feat of imagination by no means easy to perform. But it is admitted that the sub-section does apply in this case, and effect must therefore be given to the hypothesis which it enjoins, however unreal and remote from the actual facts of the case the process may appear. Having done, to the best of our ability, that which the sub-section requires, we think there is really no doubt as to the validity of the claim.

[His Lordship then considered the claim under s. 46 of the Finance Act, 1940, and the issues and arguments arising thereon but said that, as it was admitted by the Crown that the claim under s. 46 was alternative to that under s. 43 and s. 56, sub-s. 2, it was unnecessary to decide this question.]

In the result we hold that the order of Croom-Johnson J. should be discharged and that estate duty should be declared to have become payable under s. 43 read in conjunction with s. 56, sub-s. 2, of the Finance Act, 1940, on the death of the deceased on the principal value ascertained in accordance with s. 55, sub-s. 2 of the same Act of the 50,000 ordinary shares of the defendant company. Duty having already been paid on the principal value of the instalments of the 750,000*l.*, which remained outstanding at the death of the deceased, and of the preference shares, no smaller value should be placed on those instalments or on the preference shares for the purpose of valuing the ordinary shares by reference to the net assets of the company under s. 55, sub-s. 2, except on the footing of an appropriate adjustment in favour of the respondents of the duty already paid.

Appeal allowed.
Leave to appeal.

Solicitors: *Solicitor of Inland Revenue; Dawson & Co.*

H. C. G.

Note.

ATTORNEY-GENERAL *v.* ST. AUBYN.

This appeal to the Court of Appeal (SOMERVELL, SINGLETON and JENKINS L.JJ.) raised the question whether on the death of Sir Hugh Molesworth St. Aubyn, Bart., the former tenant for life of property in Devon and Cornwall, known as the Tetcott Estate, estate duty became payable on the principal value of that estate under s. 1 of the Finance Act, 1894, in conjunction with s. 43 of the Finance Act, 1940, notwithstanding that the deceased's life interest had before his death been surrendered and merged in the interest in remainder of his son, the defendant and appellant, Sir John Molesworth St. Aubyn, Bart.

Millard Tucker K.C. and *N. C. Armitage* for the appellant.

Sir Frank Soskice S.-G., Upjohn K.C. and *J. H. Stamp* for the Crown.

Dec. 14, 1949. JENKINS L.J., read the judgment of the court. After stating the question in issue as above, he continued:

Section 1 of the Finance Act, 1894, is of course the familiar section imposing the charge of estate duty on the principal value of all property settled or not settled which "passes on "the death" of any person (i.e. changes hands on the death :) *Earl Cowley* v. *Commissioners of Inland Revenue* (1), while s. 2 of the same Act (of which s. 43 of the Finance Act, 1940, is in effect an extension) enlarges the area of charge by declaring that property passing on the death of the deceased shall be deemed to include property falling within any of the various descriptions therein mentioned although it may not actually change hands on the death so as

(1) [1899] A.C. 198.

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to be property "passing on the death" within the meaning of s. 1 itself. Sub-section 1 (*c*) of s. 2 of the Act of 1894 included in the category of property deemed to pass on the death property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889 (with certain modifications to which we need not refer) and the provisions thus incorporated in the estate duty legislation had the effect of bringing into charge (inter alia) property comprised in gifts inter vivos made within twelve months before the death of the deceased and also property taken under any gift whenever made of which bona fide possession and enjoyment should not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor and of any benefit to him by contract or otherwise.

The decisions in *Attorney-General* v. *Beech* (1), and *Attorney-General* v. *De Preville* (2), having shown that s. 2, sub-s. 1 of the Finance Act, 1894, did not suffice to bring into charge property in which the deceased had a life interest which had been surrendered and extinguished by a disposition inter vivos, this omission was made good by s. 11 of the Finance Act, 1900, which, to put it shortly, provided in effect that property in which the deceased or any other person had an interest limited to cease on the death of the deceased should be deemed to pass on the death of the deceased, notwithstanding that it had been surrendered or otherwise disposed of whether for value or not to or for the benefit of the remainderman or reversioner, unless the same conditions were fulfilled as were required to exempt property comprised in a gift inter vivos from liability to duty under s. 2, sub-s. 1 (*c*) of the Act of 1894. By s. 59, sub-s. 1 of the Finance (1909–10) Act, 1910, the period of three years was substituted for twelve months as the period preceding the death of the deceased before which a gift inter vivos under s. 2, sub-s. 1 (*c*) of the Act of 1894 or a surrender of an interest limited to cease on the death of the deceased under s. 11 of the Act of 1900 must have been made or effected in order to escape liability to duty. Section 43 of the Finance Act, 1940, replaced, and substantially extended the scope of, s. 11 of the Finance Act, 1900, with a view, no doubt, to defeating various methods which had been evolved of evading the operation of the old section, e.g. by means of assignments by tenant for life and remainderman of their respective interests to a third party, or other indirect methods of effecting a merger of the life interest. The common expedient of making such assignments to a company formed for the purpose had already been specifically dealt with by s. 35 of the Finance Act, 1930.

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(1) [1899] A.C. 53.

(2) [1900] 1 Q.B. 223.

[His Lordship read s. 43, sub-ss. 1, 2 and 6 of the Act of 1940, and continued :]

Section 43 of the Finance Act, 1940, must be read in conjunction with s. 56, sub-s. 2 of the same Act, which provides as follows : " (2.) Where a company to which this section " applies was concerned in the disposition or determination " of an interest limited to cease on a death effected or suffered " as mentioned in sub-s. 2 of s. 43 of this Act, or in a surrender " made as mentioned in sub-s. 3 of s. 48 of this Act, " or was concerned in any one or more of associated " operations of which the disposition or determination or " surrender formed one, the conditions as to the entire exclusion " of the person who had the interest or of the deceased, and " of any benefit to him, specified in the said sub-s. 2 or in the " said sub-s. 3 as the case may be, shall be treated as " having been satisfied if and only if they would have " been so treated in the circumstances aforesaid." The " circumstances aforesaid " referred to in this sub-section are those stated in sub-s. 1 of s. 56 as " the following circum" stances, namely, if the assets of the company had " been held by it on trust for the members thereof and " any other person to whom it is under any liability incurred " otherwise than for the purposes of the business of the company " wholly and exclusively, in accordance with the rights attach" ing to the shares in and debentures of the company and " the terms on which any such liability was incurred, and " if the company had acted in the capacity of a trustee only " with power to carry on the business of the company and to " employ the assets of the company therein."

Sir Hugh having died on January 5, 1942 (and thus after the coming into force of the Finance Act, 1940), it was claimed that in the circumstances stated below estate duty became payable on his death on the principal value of the Tetcott Estate either by virtue of s. 43, sub-s. 1 of the Finance Act, 1940, alone or alternatively by virtue of that sub-section read in conjunction with s. 56, sub-s. 2 of the same Act.

The circumstances relevant to the claim are these :—

(1.) Immediately before the execution of the next-mentioned assignment, Sir Hugh was beneficially entitled for life to the Tetcott Estate and the Pencarrow Estate in Cornwall, and certain personal property, with remainder to Sir John in tail male with remainders over.

(2.) By an assignment dated August 14, 1926, Sir Hugh assigned his life interest in the Tetcott Estate, the Pencarrow Estate, and the above-mentioned personal property, to the Molesworth St. Aubyn Estates Company (a private unlimited company incorporated under the Companies Acts, 1908, to 1917, below referred to as " the Old Company ") in consideration of an annuity of 7,000*l*. and the issue to him of 100 shares of the Old Company of 1*l*. each credited as fully paid up, and the Old Company covenanted to pay to Sir Hugh during his life the said annuity of 7,000*l*. as therein mentioned.

(3.) By a further deed dated June 20, 1929, the Old Company covenanted with Sir Hugh to pay him during his life an additional annuity of 2,000*l*. in consideration of his surrendering 100 shares of the Old Company credited as fully paid. The effect of this surrender was to reduce the issued share capital of the Old Company to three shares all of which were in the beneficial ownership of Sir Hugh.

(4.) The two annuities amounting together to 9,000*l*. per annum were approximately equal to the net income of the Old Company.

(5.) On July 16, 1929, the Old Company went into voluntary liquidation with a view to reconstruction and on July 24, 1929, a limited company called " The Molesworth St. Aubyn " Estates Company Ld. (below referred to as 'the New " 'Company' ") was registered under the Companies Acts, 1908 to 1917, with a view to the acquisition of the undertaking of the Old Company.

(6.) The terms of such acquisition were set out in an agreement dated August 17, 1929, and made between the Old Company of the first part, its liquidator of the second part, and the New Company of the third part, which provided for the transfer to the New Company of all the assets of the Old Company subject to any liabilities affecting the same in consideration of the New Company paying satisfying and discharging all the debts liabilities and obligations of the Old Company and allotting to every member of the Old Company one 1*l*. share of the New Company credited as fully paid up for every share in the Old Company held by him.

(7.) Pursuant to this agreement the New Company allotted three of its shares credited as fully paid to the holders of the three issued shares of the Old Company, and by an assignment dated August 17, 1929, the Old Company and its liquidator assigned to the New Company Sir Hugh's life interest in the Tetcott Estate, the Pencarrow Estate and the personal property above mentioned (or in the property then representing the same respectively) including all income accrued therefrom and then owing to the Old Company.

(8.) Until after October 25, 1930, the only issued shares of the New Company were the three shares allotted to the holders of the three issued shares of the Old Company and the two shares issued to the signatories of the memorandum of association of the New Company, and all these five issued shares of the New Company were in the beneficial ownership of Sir Hugh until dealt with as mentioned below.

(9.) By a deed of family arrangement dated October 25, 1930, Sir John and Sir Hugh agreed (so far as material for the present purpose) :—

(i.) That Sir Hugh should procure the New Company (*a*) to purchase Sir John's reversionary interest in the unsold parts of the Pencarrow Estate and in certain investments and heirlooms, and (*b*) to surrender Sir Hugh's life interest in the Tetcott Estate to Sir John, such life interest to be taken, at the full market value thereof, in part satisfaction of the consideration for the sale of the said reversionary interest.

(ii.) That the balance of the consideration for the property to be purchased by the New Company, taken at its full market value, was to be satisfied by the allotment to Sir John of all the unissued share capital of the New Company credited as fully paid up and of income debentures as therein mentioned, such shares and debentures to be held by Sir John in trust for himself absolutely in the event (which happened) of his surviving Sir Hugh.

(iii.) That Sir Hugh should concur in the assurance or assurances to the New Company for the purpose of vesting in it the absolute beneficial interest in all the property in which the reversionary interest was to be purchased from Sir John.

(iv.) That the payment of the above-mentioned annuity of 9,000*l*. should be unconditionally guaranteed by Sir John to Sir Hugh, who should be at liberty (without affecting such guarantee) to release the New Company (if he thought fit) from all liability to pay the same.

(v.) That the five shares in the New Company to which Sir Hugh was beneficially entitled should be forthwith transferred to Sir John or his nominees.

(vi.) That during the lifetime of Sir Hugh his powers as governing director of the New Company should not be affected without his consent, but that he should not be entitled to receive any payment from the New Company by way of remuneration or otherwise.

(vii.) That the Tetcott Estate and investments, Sir Hugh's life interest in which was to be surrendered by the New Company to Sir John, should be disentailed by Sir John with Sir Hugh's concurrence but should not be transferred to the New Company or resettled.

(10.) Pursuant to the deed of family arrangement :—

(i.) By a deed dated October 29, 1930, and made between the New Company of the one part and Sir John of the other part, the New Company surrendered and conveyed to Sir John, Sir Hugh's life interest in the Tetcott Estate to the intent that such life interest might merge and be extinguished in the remainder expectant thereon. (From a recital in this deed it appears that the assignment by Sir John to the New Company of the reversionary interest agreed to be sold by him had been completed by a deed of the same date.)

(ii.) By a further deed dated October 29, 1930, and made between Sir John of the one part and Sir Hugh of the other part, Sir John guaranteed the payment to Sir Hugh during his life of the above-mentioned aggregate annuity of 9,000*l*.

(iii.) By a deed dated November 17, 1930, and made between Sir Hugh of the one part and the New Company of the other part, Sir Hugh released the New Company from the said annuity and all claims and demands in respect thereof.

In these circumstances inasmuch as Sir Hugh's life interest in the Tetcott Estate had, after becoming an interest in possession, been determined in his lifetime by means of the New Company's surrender in favour of Sir John, and apart from such surrender the Tetcott Estate would clearly have passed on the death of Sir Hugh under s. 1 of the Finance Act, 1894, it was not in dispute that the case fell within sub-s. 1 of s. 43 of the Finance Act, 1940, with the result that the Tetcott Estate must be deemed to pass on the death of Sir Hugh by virtue of s. 43, unless the exemption from the operation of sub-s. 1 of that section afforded by sub-s. 2 was applicable. The question at issue was, therefore, whether the circumstances of the case were such as to fulfil the conditions on which that exemption depends. So far as material for the present purpose, three conditions of exemption are prescribed by sub-s. 2. The first is that the relevant disposition or determination should have been bona fide effected or suffered three years before the death. The second is that bona fide possession or enjoyment of the property in which the interest subsisted should have been assumed immediately thereafter by the person becoming entitled upon the disposition or determination. The third is that the person so becoming entitled should thenceforward have retained such possession or enjoyment to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise. Of these conditions it is not in dispute that the first two were fulfilled in the present case, as, whatever is meant by "the relevant "disposition," the latest in date of the three dispositions here in question, namely, the surrender of October 29, 1930, by the New Company to Sir John, was effected more than three years before the death of Sir Hugh on January 5, 1942, and Sir John assumed possession immediately upon that surrender. It is, however, claimed for the Crown that the third condition was not fulfilled because Sir Hugh was "the person who had "the interest" within the meaning of sub-s. 2 and he received a benefit in the shape of the annuity (originally of 7,000*l.*, and later increased to 9,000*l.*) which continued to be payable to him from the date of the assignment by him of his life interest to the Old Company on August 14, 1926, down to the date of his death.

The Crown's primary contention in support of this claim, both as formulated in the information and as argued before Croom-Johnson J. and in this court, was founded upon s. 43 alone, without recourse to s. 56. sub-s. 2, and (as developed in argument) was substantially of this nature :—

> (i.) Apart from special cases of determination of life interests otherwise than by disposition, which have no relevance here, s. 43, sub-s. 1 applies wherever it is found on a death (*a*) that the deceased had a life interest in property; (*b*) that such life interest was disposed of in the lifetime of the deceased; and (*c*) that such life interest was determined in the lifetime of the deceased (whether by the deceased's own disposition or by some subsequent disposition made by a person claiming through him) with the result that the property did not pass on the death of the

deceased under s. 1 of the Act of 1894 as it would have done if his life interest had remained on foot until his death.

(ii.) If these conditions are satisfied then in a case in which there have been successive dispositions of the life interest, the last of them bringing about its determination (as for example in the present case the assignment by Sir Hugh to the Old Company, the assignment by the Old Company to the New Company, and finally the surrender by the New Company to Sir John), any one of the successive dispositions (and not necessarily the disposition which in itself brought about the determination of the life interest) can be relied on by the Crown not only as being a disposition of the life interest within the broad terms of the opening words of s. 43, sub-s. 1 (which it obviously must be), but also as being a disposition " apart from " which the property would have passed on the death under s. 1 of the Act of 1894, and further as being " the relevant disposition " within the meaning of sub-s. 2. In particular the Crown can in such a case rely simply on the initial disposition under which the deceased parted with his life interest and need not concern itself with the subsequent dispositions through which the determination was ultimately brought about.

(iii.) The Crown is therefore entitled in the present case to rely on Sir Hugh's assignment to the Old Company as being a disposition within the meaning of s. 43, sub-s. 1 in general, and in particular as being a disposition " apart " from " which the Tetcott Estate would have passed on his death under s. 1 of the Act of 1894, because if Sir Hugh had not made this assignment the Old Company could not have assigned to the New Company and the New Company could not have surrendered to Sir John.

(iv.) Sir Hugh's assignment to the Old Company is " the " relevant disposition " for the purposes of sub-s. 2, because it is the disposition relied on by the Crown for the purposes of sub-s. 1 (*a*) and the disposition referred to in both places must as a matter of construction be the same.

(v.) Sir Hugh's assignment to the Old Company thus being " the relevant disposition " for the purposes of sub-s. 2, Sir Hugh was clearly " the person who had the interest " within the meaning of the same sub-section, inasmuch as he was the person who had owned the life interest down to the date on which it was assigned to the Old Company.

(vi.) In view of the annuity, Sir Hugh as " the person

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"who had the interest" was clearly not excluded from "all benefit." The third condition of exemption prescribed by sub-s. 2 was therefore not fulfilled, and the property was accordingly deemed to pass on his death by virtue of sub-s. 1.

This contention seems in effect to have been accepted by the learned judge, who decided the case in favour of the Crown, substantially on the short ground that Sir Hugh's assignment of his life interest to the Old Company was a disposition to which s. 43, sub-s. 1 applied, notwithstanding that it did not in itself prevent the property from passing under s. 1 of the Act of 1894, that Sir Hugh received a benefit in the shape of the annuity, and that the two subsequent dispositions of the life interest, while possibly providing the Crown with alternative grounds for its claim under s. 43, sub-s. 1, were immaterial for the purposes of the claim based on Sir Hugh's assignment. With respect to the learned judge, we find it difficult to accept the reasoning on which his conclusion was based, or the argument for the Crown by which he was presumably led to adopt that reasoning. After all due allowance is made for the greater width of expression manifested in s. 43 of the Finance Act, 1940, as compared with s. 11 of the Finance Act, 1900, and in particular the inclusion in the later section of all dispositions no matter to whom they are made and not merely dispositions to or for the benefit of the remainderman or reversioner as in the earlier one, the fact remains that s. 43, sub-s. 1 is addressing itself to a situation in which property does not pass on the death under s. 1 of the Act of 1894, and accordingly, in order that duty may nevertheless be exigible, must be deemed to pass on the death by an extension of the principles of s. 2 of that Act. Section 43, sub-s. 1 is further addressing itself to a situation in which property has in the first instance been settled in such a way that it would have passed on the death of the deceased under s. 1 of the Act of 1894 but there has been some disposition or determination of the deceased's interest in his lifetime which has prevented the property from so passing. Section 43, sub-s. 1 admittedly has nothing to say to a case in which the property does pass on the death of the deceased under s. 1 of the Act of 1894, whether it so passes because there have been no dispositions of the deceased's interest, or because the only dispositions there have been were such as merely to change the ownersihp of the deceased's interest while preserving its separate existence as an interest ceasing on his death—for instance, where a life tenant has merely assigned his interest, not to the remainderman but to a third party, who or whose successors in title (none of them being the remainderman) have retained it intact down to the original life tenant's death.

It therefore seems to us difficult to resist the conclusion that sub-s. 1 (*a*), in providing that "If apart from the disposition " . . . . the property . . . . would have passed on the death " under s. 1 of the Finance Act, 1894, [it] shall be deemed by " virtue of this section to be included . . . . in the property " passing on the death," means that if apart from the disposition which prevented it from doing so the property would have passed on the death under s. 1 of that Act it shall be deemed to pass by virtue of s. 43. In other words, we think that "if apart from the disposition" should be construed as equivalent to "if but for the disposition," and that a disposition cannot for this purpose be regarded as one "apart " from" which or "but for" which the property would have passed under s. 1 of the Act of 1894 unless it was a disposition which prevented the property from so passing, so as to make it appropriate that the property, not actually passing, should be deemed to pass. It was argued for the Crown that "apart " from the disposition" has a different meaning from "but " for the disposition," but in this context we think there is no distinction. To construe "apart from the disposition" as meaning "irrespective of the disposition" or "whether the " disposition had been made or not" seems to us hardly to accord with the sense of the sub-section. Nor can we accept the Crown's argument to the effect that Sir Hugh's assignment was a disposition "apart from" or "but for" which the property would have passed on his death under s. 1 of the Act of 1894, because otherwise the Old Company could not have assigned to the New Company and the New Company could not have surrendered to Sir John. The true position as it seems to us is that "apart from" or "but for" the New Company's surrender to Sir John, which prevented it from doing so, the property would have passed on Sir Hugh's death under s. 1 of the Act of 1894 notwithstanding Sir Hugh's assignment to the Old Company and the Old Company's assignment to the New Company. In our opinion therefore there are cogent grounds for the view that the disposition which in the present case is relevant for the purposes of s. 43, sub-s 1,. and is also "the relevant disposition" for the purposes of sub-s. 2, is the New Company's surrender to Sir Hugh. The language of s. 43, sub-s. 2 suggests that "the person who "had the interest" must be the person who was the beneficial owner of it immediately before the relevant disposition. That view accords with the requirement that possession and enjoyment must be assumed and thenceforward retained to the entire exclusion of the person who had the interest, which implies that the person who had the interest must have possessed and enjoyed it down to the date of the disposition, and thereafter have been excluded from such possession and enjoyment by the person becoming entitled under the disposition. Accordingly, on the footing that the surrender was the relevant disposition, it might well follow that the New Company was "the person who had the interest." But the New Company (as is admitted by the Crown) received no benefit apart from the provision in the deed of family arrangement to the effect that Sir Hugh, while retaining his powers as governing director, should not be entitled to receive any payment from the New Company by way of remuneration or otherwise, which in our view clearly could not be regarded as a benefit for the purposes of sub-s. 2. This difficulty might be surmounted if the Crown could successfully contend that "the person who had the interest" in sub-s. 2 means "the "person who originally had the interest" (i.e. Sir Hugh) or alternatively "any person who at any time had the interest" (i.e. including Sir Hugh). But it seems to us far from easy, as a matter of construction, to justify either of these two meanings for the words in question. Again, the Crown might succeed in making Sir Hugh "the person who had the interest" if the two assignments and the surrender could properly be treated as together constituting one composite disposition or if the word disposition could be read in the plural as including all dispositions from the original assignment by the life tenant so that for the purpose of sub-s. 2 the effect of all the dispositions could be considered.

These are difficult points and we find it unnecessary to express any final conclusion in the present case on the question whether the Crown could have made good its claim under s. 43, sub-s. 1 alone, without recourse to s. 56, sub-s. 2, as it seems to us reasonably plain that the alternative claim based on s. 43, sub-s. 1 in conjunction with s. 56, sub-s. 2 is well founded. We therefore prefer to leave the various points of difficulty, to which we have adverted, open for resolution one way or the other in some future case in which s. 56, sub-s. 2 will not be available and the result will therefore turn on the unaided scope and effect of s. 43.

As to the alternative claim under s. 43, sub-s. 1 in conjunction with s. 56, sub-s. 2, the matter stands thus:—The New Company was admittedly a company to which s. 56 applied, which makes it unnecessary for us to refer to the complicated referential definition of such companies contained in s. 58. Sir Hugh was admittedly the beneficial owner of all the issued shares of the New Company from its incorporation until October 25, 1930 (i.e. the date of the deed of family arrangement which must, we think, be the critical date for this purpose) and although the date of the allotment to Sir John of the unissued shares of the New Company pursuant to the deed of family arrangement is not in evidence, this presumably did not take place until October 29, 1930, when the assurances by the New Company to Sir John and by him to the New Company were completed and the five issued shares or the beneficial interest therein were transferred by Sir Hugh to Sir John. Finally, the New Company as the actual surrenderor was clearly "concerned" within the meaning of s. 56, sub-s. 2 in the disposition of Sir Hugh's life interest constituted by the New Company's surrender of it to Sir John. It follows that by virtue of s. 56, sub-s. 2 the condition as to the entire exclusion of the person who had the interest and of any benefit to him, specified in s. 43, sub-s. 2, is to be treated as having been satisfied if and only if it would have been so treated in the circumtances stated in s. 56, sub-s. 1. In view of the fact that Sir Hugh was the beneficial owner of all the issued shares of the New Company, the assumption of those hypothetical circumstances in the present case produces the result that the New Company is to be treated as having held its assets (i.e. Sir Hugh's life interest in the Pencarrow and Tetcott Estates and the other property above referred to) in trust to pay thereout the 9,000*l.* annuity to Sir Hugh during his life, and subject to such payment in trust for Sir Hugh absolutely, with power to the New Company as such trustee to carry on its business and employ its assets therein. In other words, the New Company is to be regarded (in effect) as having held its assets in trust for Sir Hugh absolutely as sole beneficiary, subject only to the powers just mentioned, which amount in substance to general powers of management. If these hypothetical circumstances had existed in reality, it seems to us reasonably plain that Sir Hugh as the sole beneficiary under the hypothetical trust of the New Company's assets would, in relation to the surrender of his life interest by the New Company to Sir John, have been " the person " who had the interest " within the meaning of s. 43, sub-s. 2. It further seems to us reasonably plain that Sir Hugh as " the " person who had the interest " would not have been excluded from all benefit since he received a palpable benefit in the form of Sir John's guarantee of the 9,000*l.* annuity. We should here note that a question was raised in the course of the argument as to whether the New Company ever assumed any direct liability to Sir Hugh for the annuity as opposed to a mere liability to the Old Company for its payment. This seems to us to be immaterial for the present purpose, except in the sense that if the New Company was under no direct liability to Sir Hugh for the annuity, the benefit represented by Sir John's guarantee was all the more valuable. Mr. Tucker, for Sir John, contested the claim under s. 43, sub-s. 1 in conjunction with s. 56, sub-s. 2 on (in effect) three grounds. First, he said that " the person who had the interest " must be identified by reference to s. 43 alone, and that s. 56, sub-s. 2 was only available for the purpose of ascertaining whether the person so identified was excluded from all benefit. We see no justification for placing this restricted construction on the language of this sub-section. The identity of " the person " who had the interest " must necessarily depend on the beneficial ownership of the interest, and the provisions of s. 56, sub-s. 2 are on the face of them directed to imputing beneficial ownership to some person or persons other than the company concerned in the disposition. If the interest in question was comprised in the company's assets so that the effect of applying s. 56, sub-s. 2 is to bring about a notional change in the beneficial ownership of such interest, the identity of " the person who had the interest " must necessarily suffer a corresponding notional change.

Secondly, Mr. Tucker argued that on the principal of *Lord Sudeley* v. *Attorney-General* (1), Sir Hugh had no interest in the New Company's assets under the hypothetical trust. But *Lord Sudeley* v. *Attorney-General* (1) was a case of an unadministered residuary estate, and has no bearing upon a trust such as the hypothetical trust here in question relating to ascertained and specific trust property. Moreover, under the hypothetical trust in the present case, Sir Hugh as sole beneficiary could have called for the transfer to himself of the trust property at any time, subject only to the discharge of any outstanding liabilities.

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(1) [1897] A.C. 11.

Thirdly, Mr. Tucker contended that the facts in evidence (i.e. as no other evidence was adduced by either side the facts established by the interrogatories and the answers thereto) did not suffice to bring the beneficial ownership of the assets home to Sir Hugh upon the application of the statutory hypothesis. He suggested that (for instance) there might be, in addition to Sir Hugh's annuity, some liability of the New Company, incurred otherwise than for the purposes of its business wholly and exclusively, to some person other than Sir Hugh. Apart from income tax (which we think is clearly beside the point) he did not attempt to specify any such liability, but merely put the possibility to demonstrate the alleged incompleteness of the evidence on a matter with respect to which the onus of proof was on the Crown. In our judgment this point is clearly not open to the defendant. The 18th interrogatory in terms raised the questions whether at the date of the deed of October 25, 1930, the New Company would not in the circumstances postulated by s. 56, sub-s. 2 have held its interest in the Tetcott Estate in trust for Sir Hugh as the sole beneficial owner of its issued share capital, and whether at the same date Sir Hugh would not have been the person beneficially entitled to such interest; and the defendant's answer to this interrogatory was merely to the effect that this was immaterial, without any suggestion of the existence of any facts which would have made the effect of the application of s. 56, sub-s. 2 different from that alleged in the interrogatory. Moreover, no attempt was made at the hearing before the learned judge to adduce any evidence of any such facts.

Mr. Armitage advanced a further argument to the effect that the 9,000*l.* annuity was wholly referable to the Pencarrow Estate which, it will be remembered, was vested in the New Company absolutely pursuant to the deed of family arrangement. He relied on the facts stated in para. 11 of the defendant's answer, which were (shortly) to the effect that the 9,000*l.* annuity was never paid in full to Sir Hugh in any year from October 29, 1930, until his death; that by a deed dated February 19, 1931, Sir John charged the annuity on the debentures of the New Company; that in the year 1931 and subsequent years the net distributable income of the Pencarrow Estate was always insufficient to pay the annuity; and that in these circumstances Sir Hugh voluntarily submitted to an arrangement under which the amount payable by Sir John in respect of the annuity was reconsidered by Sir Hugh year by year with reference to the net distributable income of the Pencarrow Estate, the reduced amount accepted by Sir Hugh for each year being in practice paid by the New Company, and set off against the debenture interest and dividends receivable from the New Company by Sir John. Admittedly, this arrangement was a purely voluntary one, with no consideration to support it, and was never embodied in any formal document. On these facts, Mr. Armitage contended (as we understood him) that the surrender of Sir Hugh's life interest in the Tetcott Estate by the New Company to Sir John took effect to the entire exclusion of any benefit to Sir Hugh, because Sir Hugh in fact received, in lieu of the 9,000*l.* annuity, only a reduced annual sum corresponding to the net distributable income of the Pencarrow Estate, which must be regarded as a benefit exclusively referable to that estate, thus leaving the surrender of Sir Hugh's life interest in the Tetcott Estate as a disposition in respect of which no benefit whatever was received by Sir Hugh. We cannot accept this contention. It is plain that in origin the 9,000*l.* annuity represented (as to 7,000*l.* directly and as to 2,000*l.* by way of substitution for the 100 shares originally issued to Sir Hugh) the consideration for the transfer to the Old Company of Sir Hugh's life interest in the Tetcott Estate as well as the Pencarrow Estate. It is also plain that the provision in the deed of family arrangement under which Sir John guaranteed the payment of the 9,000*l.* annuity was not exclusively referable to the Pencarrow Estate. On the contrary the reasonable inference is that the guarantee was provided for in order to make up to Sir Hugh for the diminution in the income available for payment of the 9,000*l.* annuity by the New Company occasioned by the New Company's surrender to Sir John of Sir Hugh's life interest in the Tetcott Estate. The fact that Sir Hugh (in exercise of the power reserved to him to do so without affecting the guarantee) released the New Company from liability for the annuity, thus making Sir John principally and solely liable for it, cannot affect the question. The substance of the transaction was that Sir Hugh's right to receive the full income he had previously been entitled to,

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in the shape of the 9,000*l*. annuity, was preserved to him notwithstanding the surrender to Sir John of part of the property which had previously produced that income, namely Sir Hugh's life interest in the Tetcott Estate. This result was achieved by Sir John's guarantee and the subsequent substitution of Sir John for the New Company as principal debtor in respect of the 9,000*l*. annuity. Sir Hugh retained down to the date of his death a legally enforceable right to payment in full of the 9,000*l*. annuity, and in our judgment it is immaterial for the present purpose that year by year from 1931 onwards he voluntarily accepted lesser sums than the full annual amount he was legally entitled to receive.

We are accordingly of opinion that none of the points taken for the appellant on this part of the case provides an effective answer to the Crown's claim under s. 43, sub-s. 1, in conjunction with s. 56, sub-s. 2, which, for the reasons we have endeavoured to state, should in our judgment succeed. It follows that as we have reached the same conclusion as the learned judge, though by a different and longer route, the order made by him should be affirmed subject only to its variation so as to declare that the duty became payable under s. 1 of the Finance Act, 1894, in conjunction with ss. 43 and 56, sub-s. 2 of the Finance Act, 1940, instead of referring merely to s. 1 of the former, in conjunction with s. 43 of the latter, Act.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Dawson & Co.*

H. C. G.

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May 9.

Lord Goddard C.J., Humphreys and Morris JJ.

NICHOLAS *v.* PENNY

Road traffic—Driving at excessive speed—Proof—Evidence of police constable—Speedometer reading—Whether evidence of accuracy of speedometer necessary—Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 1, *s.* 2, *sub-s.* 3 (3).

If a mechanical device, such as a watch or a speedometer, records a particular time or speed, that is prima facie evidence of that time or speed, notwithstanding that no evidence is adduced as to the accuracy of the device.

Where, therefore, a police constable gave evidence that he drove a police-car at an even distance behind the defendant's motor-car for four-tenths of a mile along a road subject to a speed limit of 30 m.p.h., and that the speedometer of the police-car showed an even speed of 40 m.p.h., and also gave evidence (which was inadmissible on the ground that it was hearsay) of tests to show that the speedometer was accurate,

Held, that the constable's evidence was prima facie evidence on which the justices could convict the defendant of driving in excess of 30 m.p.h., if they were in fact satisfied that he had so driven, notwithstanding that no admissible evidence had been given as to the accuracy of the speedometer.

Gorham v. *Brice* (1902), 18 T. L. R. 424, and *Plancq* v. *Marks*. (1906), 94 L. T. 577, followed.

Melhuish v. *Morris* [1938] 4 All E. R. 98, not followed.

Case stated by Wiltshire justices.

An information was preferred against the defendant charging him with unlawfully driving a motor-car in a built-up area at a speed exceeding thirty miles an hour, contrary to s. 1 of the Road Traffic Act, 1934.

On the hearing of the information the following facts were proved or admitted:—On October 2, 1949, at 4.45 p.m., a police constable, while driving alone in a police-car, followed the defendant's car from High Street, Marlborough, to the end of the built-up area along the Bath Road. The constable kept an even distance behind the defendant's car which he was himself driving. From a point in the Bath Road opposite the Marlborough College Memorial Hall to the end of the built-up area, a distance of four-tenths of a mile, the speedometer in the police-car showed an even speed of 40 m.p.h.

On August 4, 1949, and October 14, 1949, tests of the speedometer of the police-car were carried out by the police constable in conjunction with a police sergeant and another police constable. The method of testing the speedometer on each occasion and the results of the tests were as follows:—(1.) The constable drove the police-car, without any passenger in it, over a measured distance on two separate runs at speeds recorded on the speedometer as 30 m.p.h. and 40 m.p.h. respectively. (2.) The time taken by the police-car to travel over the measured distance was taken by stop-watch by a police sergeant and the second constable. (3.) The police sergeant made calculations based on the measured distance, the stop-watch recording and the speed of the police-car, and informed the police constable driving the car that on those calculations the speedometer was correct.

On the part of the defendant it was contended that the evidence of the police constable, who was the only witness for the prosecution, was not corroborated in the way required by s. 2, sub-s. 3 (3) of the Road Traffic Act, 1934, (1) or at all, and the attention of the justices was drawn to *Melhuish* v. *Morris* (2). It was contended that there was no proof of the correctness of the speedometer in the police constable's car as that officer could only prove that he was concerned in driving a car at a given speed over a measured distance; that he had no personal knowledge of the stop-watch readings, or of the correctness of those readings, or of the correctness of the stop-watch; and, therefore, that he could not give admissible evidence as to the correctness of the speedometer. It was further contended that anything that the police sergeant might have said to the constable who drove the police car was hearsay and not admissible, and that the justices were not entitled to take into consideration anything that the police sergeant said to that constable.

The justices, being of the opinion that on the evidence of the constable the speed alleged by him was recorded on the speedometer, and that the speedometer was accurate, and, having regard to *Weatherhogg* v. *Johns* (3), that they had before them more than the evidence of one witness to the effect that in the opinion of that witness the speed limit was being exceeded, held that the objection on behalf of the defendant could not be sustained, convicted him, fined him 1*l.* and ordered that his driving licence should be endorsed.

The questions left for the court were: (1.) whether the justices rightly admitted the evidence of the constable as to the tests of the speedometer which he had carried out jointly with the sergeant and the second constable, and in the course of which he relied on the observations of and information given by those officers who did not give evidence before the justices. (2.) Whether, on the above statement of facts, the justices came to a correct determination and decision in point of law.

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(1) Road Traffic Act, 1934, s. 2, sub-s. 3 (3): "A person prosecuted for driving a motor-vehicle on a road at a speed exceeding a speed limit . . . . shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit."

(2) [1938] 4 All E. R. 98.

(3) (1931) 95 J. P. N. 364.

Skelhorn for the defendant. The effect of s. 2, sub-s. 3 (3) of the Road Traffic Act, 1934, is that a person may be convicted of driving at excessive speed (1.) on evidence of opinion, in which case two witnesses must be of opinion that he was speeding; or (2.) on evidence of a speedometer reading, in which case there must be evidence of the accuracy of the speedometer: see *per* Lord Hewart C.J., and Charles J., in *Melhuish* v. *Morris* (1). In the present case only one witness was called for the prosecution. Admissible evidence of the accuracy of the speedometer was therefore essential. But the evidence adduced as to its accuracy was clearly hearsay and, therefore, inadmissible. The conviction should therefore be quashed.

In *Weatherhogg* v. *Johns* (2) the speedometer was, it seems, found to be accurate, and the only question which arose was whether the defendant could be convicted on the evidence of one witness. That also was the question in *Russell* v. *Beesley* (3). There was evidence in both those cases that the speedometer had been tested.

It is to be noted that in the present case the justices did not state that the police constable gave evidence that he was of *opinion* that the motor-car in question exceeded 30 m.p.h.

Widgery for the prosecutor. It must be inferred from the case stated that the police constable was of opinion that the car was exceeding 30 m.p.h. In *Weatherhogg* v. *Johns* (2) the constable who gave evidence of excessive speed also gave evidence that the speedometer had been tested; that case was similar, therefore, to the present case. It is quite clear from *Russell* v. *Beesley* (3) that a person can be convicted of driving at excessive speed on the evidence of the opinion of one police officer corroborated by a speedometer reading by him. It is not necessary that the speedometer should be tested: it can be presumed to be accurate. Phipson on Evidence (8th ed., p. 151) states: "The action of locomotives and other "mechanical agents at one time may generally be inferred from "their working at other times (*Aldridge* v. *Great Western Railway Co.* (4). And the working accuracy of scientific instruments, "*e.g.*, watches (*Gorham* v. *Brice* (5); *Plancq* v. *Marks* (6)), "thermometers, aneroids, pedometers, and the like may be "presumed; speedometers and stop-watches should be tested "and evidence of that fact given." But there is no ground on which speedometers and stop-watches can be distinguished from other scientific instruments in this respect. Indeed, *Gorham* v. *Brice* (1) and *Plancq* v. *Marks* (2) make it clear that stop-watches are to be presumed to be accurate without proof of accuracy; and the same must apply to speedometers. The evidence in the present case regarding the accuracy of the speedometer was unnecessary; therefore it does not matter that it was inadmissible. This point was not argued in *Melhuish* v. *Morris* (3).

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(1) [1938] 4 All E. R. 98.
(2) 95 J. P. N. 364.
(3) (1937) 53 T. L. R. 298.
(4) (1841) 3 Man. & G. 515.
(5) (1902) 18 T. L. R. 424.
(6) (1906) 94 L. T. 577.

Skelhorn in reply.

[LORD GODDARD C.J. Do not *Gorham* v. *Brice* (1) and *Plancq* v. *Marks* (2), which were not cited in *Melhuish* v. *Morris* (3), make it clear that stop-watches do not have to be tested? Do not the dicta on which you rely in *Melhuish* v. *Morris* (3) go too far?]

In *Plancq* v. *Marks* (2) the stop-watch was produced in court and not objected to, and that point was never raised or discussed. The only question in that case was whether s. 9 of the Motor Car Act, 1903, had been complied with. In *Gorham* v *Brice* (1), again, there was no mention of the matter in the only reported judgment.

[LORD GODDARD C.J. But C. A. Russell, K.C., there argued that the evidence as to time was inadmissible because the watch had not been tested and there was nothing to show that it was accurate, and the court rejected that argument.]

[Counsel referred to *Scott* v. *Jameson* (4)]

The present point was in the minds of the court in *Melhuish* v. *Morris* (3). Macnaghten J. dissented on the ground that the evidence there was sufficient. The present case is governed by that decision, which is plainly correct. No court should presume a speedometer to be accurate, because every motorist knows that speedometers are not accurate.

LORD GODDARD C.J. The question at issue, which at first sight seemed to be a very simple one, has developed into an interesting argument. [His Lordship referred to the facts, and continued.] The justices have asked us two questions, and it is on these questions and the way in which they are asked that the court has had some difficulty in arriving at a decision to-day. These questions were: (1.) whether the justices rightly admitted the evidence of the police constable as to the tests of the

(1) 18 T. L. R. 424.

(2) 94 L. T. 577.

(3) [1938] 4 All E. R. 98.

(4) 1914 S. C. (J.) 187.

speedometer which he carried out jointly with other police officers, and in the course of which he relied upon the observations of and information given by such officers who did not give evidence before the justices; and (2.) whether on the facts as stated by them they came to a correct determination and decision in point of law. Prima facie, if we gave a strict meaning to the language of the first question, it would seem that the justices are asking us whether hearsay is rightly admissible in evidence. Of course it is not, and we should have no difficulty in answering that question. But we do not think that we can dispose of the case in that way, and we shall have to send it back to the justices to re-consider it in the light of what we are now going to say with regard to evidence and proof in such cases.

Russell v. *Beesley* (1) is authority for the proposition that one need not have the evidence of more than one police officer in such a case if it is supported by a speedometer reading, or by some other means by which the evidence given by the officer becomes evidence of fact and not of mere opinion. Section 2, sub-s. 2 (3) of the Road Traffic Act, 1934, provides: "A person prosecuted for driving a motor-vehicle on a road at a speed exceeding a speed-limit imposed by or under any enactment shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit." Therefore, if there is only the evidence of a police officer, or any other person, who says, "I saw the vehicle in "question go by and in my opinion it was exceeding" the speed-limit, that is not enough, although if two people say that, it is in law sufficient to justify a conviction.

Russell v. *Beesley* (1) and other cases show that, if the question depends on the reading of a speedometer, a mechanical device for recording speed, the justices can act upon that and need not have the evidence of two people. The justices in *Russell* v. *Beesley* (1), being of opinion that in cases of this kind it was not desirable that the evidence of a police officer checking a person's speed from the speedometer of his own car should be accepted unless corroborated by another witness present at the time, dismissed the information without giving any opinion on the legal point raised, and the court (of which I was a member) said that the justices were wrong in that case, and that it was not necessary to call two witnesses provided the evidence given by the one witness who was called was not evidence of mere opinion. In that case the opinion of the witness was supported by his evidence that his speedometer showed a certain speed; but it is only fair to say, in view of the argument of counsel for the defendant in the present case, that there was evidence in that case that the speedometer had been tested.

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(1) 53 T. L. R. 298.

Counsel for the defendant has here relied on *Melhuish* v. *Morris* (1), and he says that that case has laid down that speedometers must in all cases be tested and that the court can only act on the evidence of one police officer supported by a speedometer reading if that speedometer has been tested. For reasons which I am going to develop in a moment, I think that that case goes too far. Of course, the justices need never accept any evidence if they do not believe it, or feel that for some reason they cannot accept it. It may be that in any particular case the justices may say, " We are not " going to accept the evidence of this speedometer reading," but the question which now arises is whether or not it is necessary, as a matter of law, before the speedometer reading can be accepted, that the court must have evidence before it that it was tested. I think it right to say that the effect of the judgments of Lord Hewart, C.J., and Charles, J., in that case was that it must. Charles, J., said (2): " Therefore, the case " rested upon the accuracy of the speedometer, which had " not been tested. . . . It does not matter if five officers glued " their eyes to the speedometer if evidence is not given as to its " accuracy." Much the same was the opinion of Lord Hewart, who said that the police were relying on a mechanical device. Macnaghten, J., took a different view.

That case is not a very satisfactory one because the prosecutor was not represented on appeal, and a case which has not been argued on both sides has nothing like the weight of authority of one which has been fully argued. Counsel for the defendant said in the present case, however, that that was a decision which this court could not overrule. But, without necessarily saying that we can always differ from a previous decision of the Divisional Court merely because it has not been argued on both sides, the court is not obliged to follow that decision, for it has been laid down by the Court of Appeal in *Young* v. *Bristol Aeroplane Co., Ld.* (3), which has been followed quite recently in this court, that where material cases or statutory provisions, which show that a court has decided a case wrongly, were not brought to its attention the court is not bound by that decision in a subsequent case. Two remarkable cases which might have been cited to the court in *Melhuish* v. *Morris* (1) if the case had been argued on both sides were not cited to it, and those cases, I think, would have had a considerable influence on that decision.

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(1) [1938] 4 All E. R. 98.

(2) Ibid. 99.

(3) [1944] K. B. 718.

The question in the present case is whether, if evidence is given that a mechanical device such as a watch or speedometer —and I cannot see any difference in principle between a watch and a speedometer—recorded a particular time or a particular speed, which is the purpose of that instrument to record, that can by itself be prima facie evidence, on which a court can act, of that time or speed. It might be that in a particular case the court would refuse to act on such evidence. For instance, if it were a question whether a man died before midnight on a certain day and one party alleged that he died half a minute before 12 o'clock and another party that he died half a minute after 12 o'clock, and the first party said, " It was half a minute before 12 because I observed the time by the clock," it might be that the court would say, " We will not find that as a fact " unless we are satisfied as to the accuracy of the clock."

In the present case counsel for the prosecution called our attention to the fact that the speedometer must have been very inaccurate if the offence was not committed. The offence is driving at a speed exceeding 30 m.p.h., and the evidence is that the speedometer showed at the time in question that the defendant was exceeding 30 m.p.h. by no less than 10 miles an hour. It would be a considerable error in the speedometer if it were as much out as that.

The first case to which I call attention as not having been cited to the court in *Melhuish* v. *Morris* (1) is *Gorham* v. *Brice* (2), a case arising under regulations which imposed a limit of 12 m.p.h., made under the Locomotives on Highways Act, 1896. There a police constable had timed a motor-car with a stop-watch. It was argued by Mr. C. A. Russell, who appeared for the defendant who was then appealing, " that the magistrates ought not to have admitted the evidence given by the " constable as to the result shown by his timing the pace at " which the appellant was travelling, because the watch had " not been tested and there was nothing to show that it was

(1) [1938] 4 All E. R. 98.

(2) 18 T. L. R. 424.

"accurate, and that, such evidence having been improperly "admitted, the conviction should be quashed." The court refused to accept that view, and Lord Alverstone, C.J., in his judgment disposed of the case in a summary manner. He said that "he was unable to understand the motives with which "such appeals were brought, or what automobilists thought to "gain by suggesting there was no evidence as to speed, when, "as in practically every case, they did not like the findings of "magistrates." He went on to say that "they had the evidence, "given by the constable before them, and no suggestion "was made that he was a person who ought not to be believed. "The appeal was an attempt to turn a question of fact into a "question of law." There the police officer had said that he had a watch in his hand, that he timed the car, and that the car was going at such and such a pace. It was said that that evidence ought not to be accepted because the watch had not been tested. He was using a mechanical device—just as is a speedometer.

The next case, which was not cited in *Melhuish* v. *Morris* (1) was *Plancq* v. *Marks* (2), a case under the Motor Car Act, 1903. There, again, evidence was given as to the rate of speed of a motor-car depending on a stop-watch, and it was never suggested in that case that that evidence of fact should not have been given because the stop-watch had not been tested beforehand : the court accepted the evidence and the conviction stood.

Those two cases seem to show that the expressions used by Charles, J., in *Melhuish* v. *Morris* (*supra*) and, if I may say so with respect, by Lord Hewart C.J., went too far, and that it is admissible evidence for a police officer to say in such a case : "I followed this vehicle at an even distance from it and observed from my speedometer that I was progressing at the rate of 40 m.p.h., and, therefore, it must have been progressing "at that rate." No one is saying that that is more than prima facie evidence : there may be cross-examination ; there may be evidence given on the other side. The defendant may say : "that is all very well, but my own speedometer showed that "I was only going at 25 or 30 m.p.h., and it is accurate." The justices have then to make up their minds, and it may be that in such a case they might, having heard and seen the witnesses and considered their bearing in the witness-box, prefer the evidence given by the defendant to the evidence given by the police.

(1) [1938] 4 All E. R. 98.

(2) 94 L. T. 577.

The question in the present case is whether or not, if a police officer says that he was following a vehicle at an even distance from it and the speedometer on his car showed that he was going not at 30.5 m.p.h., or at just over 30 m.p.h., but at 40 m.p.h., that is evidence on which the justices can act, although it is not strictly proved before them that the speedometer has been tested.

Therefore, we propose to remit the case to the justices and ask them whether, apart from the tests which were carried out, they would have held, on the evidence of the police constable and his observation of the driving, and of his speedometer, that they were satisfied that the defendant was travelling at a speed in excess of 30 miles an hour. That is what they have to be satisfied about, and they can be satisfied about it on the evidence which was given, apart from the tests. The evidence of those tests was strictly not admissible, but the justices must make up their minds whether they were satisfied, apart from the tests, that the car was being driven at a speed exceeding 30 miles an hour.

For the reasons which I have given this case is of some importance, because we have made a considerable inroad on the decision in *Melhuish* v. *Morris* (1), a case in which, as I have said, not only was the prosecutor not represented on appeal, but the cases to which I have referred were not brought to the attention of the court.

HUMPHREYS, J.: I agree with the result proposed by my Lord and for the reasons which he has given.

MORRIS, J.: I agree.

Case remitted.

Solicitors: *McKenna and Co.; Collyer-Bristow and Co. for P. A. Selborne Stringer, Trowbridge.*

R. P. C.

(1) [1938] 4 All E. R. 98.

1950
May 11 *and* 19.

Lord Goddard C.J., Humphreys and Morris JJ.

BURROWS *v.* HALL.

Road traffic—Using uninsured motor vehicle—Disqualification for holding driving licence—Power of court to limit disqualification to vehicles of same class as that in which offence committed—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35, *sub-s.* 2, *s.* 6.

Section 35, sub-s. 2 (in Part II) of the Road Traffic Act, 1930, obliges courts, in the absence of special reasons, to impose the penalty of disqualification for twelve months on a person convicted of driving an uninsured motor vehicle, and further provides that " A person disqualified by virtue of a conviction under this " section . . . . for holding or obtaining a licence shall, for the " purposes of Part I of this Act, be deemed to be disqualified " by virtue of a conviction under the provisions of that Part."

By s. 6, sub-s. 1 (in Part I of the Act) " Any court before which " a person is convicted of any criminal offence in connexion with " the driving of a motor vehicle . . . . (*a*) may . . . . and shall " where so required . . . . order him to be disqualified for holding " or obtaining a licence for such period as the court thinks fit ; " . . . . Provided that, if the court thinks fit, any disqualification " imposed under this section may be limited to the driving of " a motor vehicle of the same class or description as the vehicle " in relation to which the offence was committed."

The effect of s. 35, sub-s. 2, of the Road Traffic Act, 1930, is to make the provisions of Part I of the Act relating to disqualification generally applicable to disqualification imposed under s. 35. Therefore, as s. 6, sub-s. 1 permits limitation of the disqualification to vehicles of the same class as that with which the offence was committed, it is within the court's discretion similarly to restrict the disqualification imposed for an offence against s. 35.

A lorry driver was convicted of using his private motor car at a time when it was not insured against third-party risks as required by s. 35 of the Road Traffic Act, 1930.

Held, that the court could in its discretion limit the disqualification imposed under the section to the driving of private motor cars, so that the defendant remained free to continue his occupation of driving lorries.

CASE STATED by the Recorder of Rotherham.

An information was preferred before a court of summary jurisdiction sitting at Rotherham against the defendant, Richard James Burrows, a lorry driver, for using a private motor car not insured against third-party risks as required by the Road Traffic Act, 1930, contrary to s. 35 of that Act.

[Reported by Miss SHEILA COBON, Barrister-at-Law]

The justices convicted the defendant, fined him 5*l*. and disqualified him for twelve months from holding a driving licence. He appealed to quarter sessions.

On the hearing of the appeal the recorder found the following facts. The defendant's occupation was that of a lorry driver, which he had been for eighteen years. He had been discharged by his employers in consequence of the above disqualification. In September, 1948, he purchased an 8-h.p. motor-car from a garage proprietor who was an agent of the Eagle Star Insurance Company, Limited. Through his agency the company at the time of purchase issued to the defendant an insurance policy covering the use of the car. At that time the defendant resided at Slade Hooton.

Early in September, 1949, he took the car to his employer's premises in Rotherham for repair, and it remained in the garage until November 10, 1949. On that date he was driving the car from his employer's premises to his home when he was stopped by a constable and asked to produce his insurance certificate. He failed to do so and was served with a notice under s. 40 of the Act of 1930 to produce the certificate at Laughton police station. On November 13, 1949, he visited Laughton police station and produced a cover note which had been issued to him in respect of his car by the insurance company, but which was effectual only from 12 noon on November 11, 1949, that was, on the day following that on which he was stopped by the constable.

The recorder, having regard to the further facts which he set out, was of opinion that there was no "special reason" which would justify him in withholding disqualification of the defendant for holding or obtaining a licence under Part I of the Act for a period of 12 months from the date of conviction. He therefore upheld the decision of the justices generally and dismissed the appeal subject to the modification referred to below.

He considered, in view of the evidence, that the case was one suitable for the application of the provision in s. 6, sub-s. 1, of the Act of 1930, that: "If the court thinks fit, any disqualification imposed under this section may be limited to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed." The defendant had been for eighteen years the driver of heavy goods vehicles insured not by himself but by his employer. The car in respect of which there was, very temporarily, not a policy of insurance in force was a private car used by him merely or mainly to take him to and from his home which was seven miles away from the starting and terminal points of his journeys. The offence which he committed had no relationship at all to the goods vehicle which he drove for a living and which was clearly insured against third-party risks by his employer. In those circumstances the recorder thought it clearly inequitable and contrary to public policy to deprive the defendant of his living in a vehicle totally unconnected with the offence. He therefore limited the disqualification imposed "to the driving of a motor "vehicle of the same class or description as the vehicle in "relation to which the offence was committed."

Counsel for the prosecutor argued that the proviso to s. 6 did not apply to Part II of the Act.

The recorder was of opinion that s. 6 was general in its application and governed all relevant sections of the Act not actually excluded. This was clearly so in his opinion from at least two considerations: in the first place s. 6 obviously had reference to sections in other parts of the Act, inasmuch as, while offences under Part IV of the Act were definitely excluded by it, there was no exclusion of offences under Parts II and III. Secondly, s. 35, the first under the heading Part II, by sub-s. 2 specifically related to disqualifications in respect of non-insurance for enforcement under the machinery of Part I of the Act in these words: "A person disqualified "by virtue of a conviction under this section or an order made "thereunder for holding or obtaining a licence shall, for the "purposes of Part I of the Act, be deemed to be disqualified "by virtue of a conviction under the provisions of that Part." The provisions as to disqualification under "that Part" of the Act were contained in s. 6, and it was that section which provided that the disqualification might be limited to the driving of a vehicle of the same class or description as the vehicle in relation to which the offence was committed.

While satisfied that ss. 6 and 35 were linked as so stated, in view of the importance of the decision to motor-car drivers and others, he consented to state the present case.

The prosecutor appealed.

A. B. Boyle for the prosecutor.

The defendant did not appear, and was not represented.

Cur. adv. vult.

May 19. Lord Goddard C.J., read the following judgment of the court :—The whole point of the case is whether the recorder had power to limit the disqualification to the driving of a motor vehicle of the same class or description as the vehicle in which the offence was committed.

Section 35, sub-s. 2 of the Road Traffic Act, 1930, obliges a court in the absence of special reasons to impose the penalty of disqualification for a period of 12 months, and the subsection goes on to say : " A person disqualified by virtue of " a conviction under this section or of an order made there- " under for holding or obtaining a licence shall, for the purposes " of Part I of this Act, be deemed to be disqualified by virtue " of a conviction under the provisions of that Part."

On turning to Part I of the Act, it is found that it relates, first, to the classification of motor vehicles, and secondly to the licensing of drivers, including provisions as to disqualification and endorsement of licences. Thirdly, it contains provisions as to driving, and offences in connexion therewith. Section 35 is contained in Part II of the Act. The provisions in Part I appear to the court to relate to disqualification and endorsement generally, and also to certain offences, such as reckless and careless driving, for which disqualification must in some cases, or in others may, be imposed ; and there are other offences for which the endorsement of a licence must be imposed, and in which disqualification need not, but may, follow.

The important section is s. 6, which provides : " Any court " before which a person is convicted of any criminal offence " in connexion with the driving of a motor vehicle (not being " an offence under Part IV of this Act)—(*a*) may in any " case, except where otherwise expressly provided by this " Part of this Act, and shall where so required by this Part " of this Act, order him to be disqualified for holding or obtain- " ing a licence for such period as the court thinks fit ; and " (*b*) may in any case, and shall where a person is by virtue " of a conviction disqualified for holding or obtaining a licence, " or where an order so disqualifying any person is made or " where so required by this Part of this Act, order that par- " ticulars of the conviction and of any disqualification " to which the convicted person has become subject shall be " endorsed on any licence held by the offender : Provided that, " if the court thinks fit, any disqualification imposed under " this section may be limited to the driving of a motor vehicle

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"of the same class or description as the vehicle in relation "to which the offence was committed."

Sub-section 2 gives a right of appeal against disqualification. Section 7 contains other provisions as to disqualification and suspension, and enables a disqualified person to apply to the court at any time after the expiration of six months from the date of the conviction to remove any remaining period of disqualification. It also makes it a specific offence for a disqualified person to drive during the period of disqualification. There is no doubt, therefore, that if a person is convicted, let us say, for the dangerous driving of a private motor-vehicle, the disqualification can be limited to that class of motor car, and the court need not disqualify him from driving a lorry, that is to say a commercial vehicle.

To turn now to s. 35, which is in Part II, it provides by sub-s. 2, that "A person disqualified by virtue of a conviction "under this section or of an order made thereunder for holding "or obtaining a licence shall, for the purposes of Part I of "this Act, be deemed to be disqualified by virtue of a conviction under the provisions of that Part." This seems to us to make the provisions of Part I concerned with disqualification generally applicable to disqualification imposed under s. 35. It is a criminal offence in connexion with the driving of a motor vehicle, and, although this particular offence is included in Part II of the Act, which is that Part which deals with the compulsory insurance of motor vehicles, we think it clear that the legislature intended that a disqualification for an offence against that Part of the Act should be treated in all respects in the same way as disqualification imposed for offences against Part I.

For these reasons, we are of opinion that the recorder was right in the view that he took and that he could limit the disqualification to the driving of a private motor vehicle only. He having that power, it cannot be doubted that this was a very proper case in which to exercise it. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Hosking & Berkeley, for J. P. Crehan, Rotherham.*

Affirmed. H.L. [1951] 2 All E.R. 600.

RICE *v.* CAPITAL AND PROVINCIAL PROPERTY TRUST LD.

CAPITAL AND PROVINCIAL PROPERTY TRUST LD. *v.* RICE.

1950
Mar. 29, 30;
May 15.

Bucknill and Denning L.JJ. and Hodson J.

Landlord and tenant—Rent restriction—Two adjacent flats let as one dwelling house—Subsequent letting as separate flats—Original letting outside Rent Acts—Ascertainment of standard rent—Apportionment of rent—Increase of Rent and Mortgage Interest (*Restrictions*) *Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 & 3—*Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1938 (1 & 2 *Geo.* 6, *c.* 26), *s.* 5—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 7, *sub-s.* 2.

Two adjacent and identical flats in a block of flats were let in February, 1939, under one lease, at an annual rent of 342*l.* 10*s.* 0*d.*, as a dwelling-house for the tenant and his family, communication between the two flats being established by a door cut in the party wall. The rateable value of this unit exceeded 100*l.* During the war of 1939–1945 both flats were damaged by enemy action, and the tenant ended his tenancy. In 1942 flat No. 27 was repaired and let at a rent of 195*l.* a year, and in 1946 flat No. 28 was also repaired and let to the plaintiff at an annual rent of 250*l.* The plaintiff brought proceedings in the county court for an apportionment of the 1939 rent. The landlords, by a cross action, asked for a determination of the standard rent, which they claimed was 250*l.*, as being the rent at which it was first let.

Held (by Bucknill L.J. and Hodson J., Denning L.J. dissenting), that the necessity to apportion depended on whether or not the dwelling-house which was the containing unit was let on September 1, 1939, irrespective of whether it was itself within or without the ambit of the Rent Restriction Acts; that notwithstanding that it was let at that date under one lease with another flat the plaintiff's flat was nevertheless "let" within the meaning of s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent Restriction Act of 1939 (1); and that an apportionment was therefore necessary to determine the standard rent.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*a*) as amended): "The expression "'standard rent" means the rent "at which the dwelling-house was "let on September 1, 1939, or, "where the dwelling-house was "not let on that date, the rent at "which it was last let before that "date, or, in the case of a dwelling-"house which was first let after "the said September 1, the rent at "which it was first let."

Sub-section 3: "Where, for the "purpose of determining the "standard rent or rateable "value of any dwelling-house "to which this Act applies, it "is necessary to apportion the

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Upsons, Ld. v. *Herne* [1946] K. B. 591 and *Sutton* v. *Begley* [1923] 2 K. B. 694 applied.

Per Denning, L.J. (dissenting). When a whole house is outside the Acts, the only justification for apportionment is the necessity to ascertain whether the part is within the Rent Restriction Acts or not. Under the old control the applicability of the Acts depended both on rateable value and rent, so both had to be apportioned. Under the present control the applicability of the Acts depends on rateable value only, so that alone need be apportioned. The standard rent of any part can perfectly well be ascertained by taking the rent at which it was first let after 1939, subject to reduction by the Rent Tribunal if it is unreasonable.

APPEAL from Bloomsbury county court.

In 1933 a block of flats known as West Hill Court was erected at Millfield Lane, Highgate. In 1934 the present landlords, Capital and Provincial Property Trust Ld., purchased the property. On the first floor of the building were two flats, Nos. 27 and 28, each of which was self-contained and possessed the same accommodation. The rateable value of each was 79*l.* The first tenant was a doctor, who leased both flats at a rent of 430*l.* a year as a dwelling house for his family, a communicat-

" rent at the date in relation to " which the standard rent is to be " fixed, or the rateable value of the " property in which that dwelling-" house is comprised, the County " Court may, on application by " either party, make such appor-" tionment as seems just . . . ."

Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 5: " Where a dwelling-house to " which the principal Acts apply " is part of another dwelling-" house to which those Acts apply, " the standard rent of the first-" mentioned dwelling-house as " from the 29th day of September, " 1938, shall be a standard rent " ascertained by apportioning the " standard rent of the second-" mentioned dwelling-house, and " subsection (3) of s. twelve of the " Act of 1920 shall apply accord-" ingly, notwithstanding that the " first-mentioned dwelling-house " was let as a separate dwelling on " or before the first day of August, " 1914, or on or before the date " on which the second-mentioned " dwelling-house was first let."

Rent and Mortgage Interest Restrictions Act, 1939, s. 7 sub-s. 2: " In relation to any " dwelling-house to which the " rateable value on the appro-" priate day was not on that " day separately assessed, any " reference in the preceding pro-" visions of this Act to the " rateable value on the appropriate " day shall be construed as a " reference to such proportion of " the rateable value on that day of " the property in which the dwell-" ing-house is comprised as may " be apportioned to the dwelling-" house by the county court in " accordance with the provisions " of subsection (3) of s. 12 of the " Increase of Rent and Mortgage " Interest (Restrictions) Act, " 1920."

ing door being cut in the party wall between the flats. At the expiration of the doctor's lease in February, 1939, another tenant took a similar lease of the two flats at a rent of 342*l.* 10*s* a year. During the war of 1939–45 the premises sustained damage and that tenant ended his tenancy. In 1942 the damage to No. 27 was repaired, the communicating door between the two flats was blocked up, and No. 27 was let as a separate dwelling at an annual rent of 195*l.* In 1946 No. 28 was also repaired and was then let as a separate flat to the plaintiff, Rice, at a yearly rent of 250*l.*

In those circumstances that tenant instituted proceedings in the county court for an apportionment of the rent of flat No. 28 under s. 12, sub-s. 3 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In cross-proceedings the landlords asked for a determination of the standard rent, which they claimed was that at which the flat was first separately let, namely, 250*l.* The two actions were tried together, and the county court judge held that, although occupied as one dwelling, the two flats were in fact " let " on September 1, 1939, within the meaning of s. 12, sub-s. 1 (*a*) of the Act of 1920, as amended by the Act of 1939, and that to ascertain the standard rent of each it was necessary to apportion the rent as at that date, as provided by s. 12, sub-s. 3. He therefore fixed the standard rent at the sum of 171*l.* 5*s.* 0*d.* The landlords appealed.

L. A. Blundell for the landlords. The appeal raises a point of principle which is of importance to property owners. If the court is of opinion that the question for consideration is determined by existing authority, it will be submitted that the present case is distinguishable. Where there is a large house which on September 1, 1939, when the Act of 1939 came into operation, was let as a whole and was of a rateable value which took it outside the Rent Acts, and that house is then divided into two separate dwellings, the standard rent of each separate dwelling is to be found, not by apportioning the rent of the whole property, but by taking the rent at which each separate dwelling is first let. Why, then, should a landlord be penalized if he carries out what is his public duty by making as many flats for homeless people as possible ?

Section 12, sub-s. 3 of the Act of 1920 provides for apportionment where it is necessary to determine the standard rent. Apportionment is not necessary in the present case because

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in 1939 the two flats were let as one unit, and are now let separately at rents which under s. 12, sub-s. 1 (*a*) of the Act of 1920 are the standard rents. Sub-section 3 of s. 12 of the Act of 1920 and s. 5 of the Act of 1938 expressly apply only to dwelling-houses which are within the Rent Restriction Acts, and inferentially are not to apply to other cases. If the principle of apportionment is to apply in the present case the words in s. 5, " to which those Acts apply " are otiose. Until *Upsons Ld.* v. *Herne* (1) it had been considered that there was no apportionment where the rateable value of the whole premises was outside the Acts. That was not the case of a house outside the Acts which was subsequently separated, but a letting in one lease of two controlled flats and a shop. If it were open it would be argued that *Upsons Ld.* v. *Herne* (1) was wrongly decided ; but it is submitted that it is distinguishable from the present case, because only rent of a figure which comes within the Rent Acts is apportionable. Section 5 of the Act of 1938 does not appear to have been brought to the court's attention.

Different principles may apply where there is a group of separate dwelling houses and a shop, and where there is a large containing house divided into separate parts. It was not until the decision in *Upsons Ld.* v. *Herne* (1) that the matter now under consideration got into confusion. In *Field* v. *Gover* (2) the court seems to have taken the view that s. 5 of the Act of 1938 was really an amending section. In principle this court ought not to arrive at the standard rent of a controlled house by apportioning something which is outside the Acts. It must look for a rent which is comparable under the Acts and ignore the rents of houses which are outside the Acts : see *Signy* v. *Abbey National Building Society* (3).

Barrett v. *Hardy Bros.* (*Alnwick*) *Ld.* (4) and *Woodhead* v. *Putnam* (5) are distinguishable. The former has reference only to the apportionment of rateable value, necessary to ascertain whether a house is within the Acts. The latter concerned a containing house which had been brought within the Acts before the time when an apportionment was sought. Admittedly, if the containing house is within the Acts apportionment applies, but, so far as the court went beyond the facts on which it had to decide, its decision was obiter and should be rejected.

(1) [1946] K. B. 591.
(2) [1944] K. B. 200.
(3) Ibid. 449.
(4) [1925] 2 K. B. 220.
(5) [1923] 1 K. B. 252.

Moreover, both those cases came before 1933, and the legislature has recognized the change that has come about by passing s. 5 of the Act of 1938.

Fortune for the tenant. Sub-s. 3 of s. 12 of the Act of 1920 is sufficiently wide to cover this case. It is unlimited. There is no suggestion in the schedule to the Act of 1938 that s. 12 is at all affected by that later Act, and there is no authority for saying that s. 12, or sub-s. 3, has been repealed save for the observations of Scott L.J. in *Field* v. *Gover* (1), which were too wide and have not been approved. Section 5 of the Act of 1938 was introduced merely to meet the anomalous position arising from the decision in *Platman* v. *Frohman* (2). There is nothing in that section which restricts an apportionment "where it is necessary." The judge found that his power under s. 12 was not limited in any way.

There can be no question that these two flats are within the Rent Restriction Acts. They were always rated at 75*l*. each, and on September 1, 1939, they were "let" within the meaning of s. 12, sub-s. 1 (*a*) of the Act of 1920. It is immaterial that they were let together: see *Upsons Ld.* v. *Herne* (3).

There is nothing in s. 12 which limits the jurisdiction of the county court to houses of which the rent is within the Rent Acts. The judge was right in saying that his jurisdiction was unfettered, that under s. 12 he was entitled to do what was just, and therefore to apportion. Where the parties do not know what is the standard rent, it is necessary to apportion in order to ascertain it. For that reason s. 12 is left wide and without limitation.

Cur. adv. vult.

May 15. BUCKNILL L.J., read the following judgment:—These are two appeals which were heard together and concern flat No. 28 on the first floor of a building called West Hill Court, Millfield Lane, Highgate. In one case the tenant of the flat applied to the court to apportion the rent of the flat. In the other case the landlords applied for the standard rent of the flat to be determined. The parties agreed that, if apportionment were necessary, the rent would be 171*l*. 5*s*. 0*d*., and that, on the other hand, if there were to be no apportionment, the standard rent would be 250*l*. [His Lordship stated

(1) [1944] K. B. 200.
(2) [1929] 1 K. B. 376.
(3) [1946] K. B. 591.

the facts, as to which there was no dispute, and continued :] The question for the decision of the court was whether the standard rent of No. 28 was to be obtained by halving the rent of the two flats of 342*l.* 10*s.* 0*d.*, or whether the standard rent was that at which the flat was first let as a separate flat, namely, 250*l.* The judge held, to quote from the note of his judgment, that " although occupied as one dwelling " these two flats were in fact let on September 1, 1939, within " the meaning of s. 12, sub-s. 1 (*a*) of the Rent Act of 1920, " as amended, and to ascertain the standard rent of each it was " necessary to apportion the rent as at that date, as provided " for by s. 12, sub-s. 3 of the said Act."

Before considering the relevant sections and decisions, and whether they are inconsistent with the judgment of the judge, I would point out that in September, 1939, flat No. 28 (whether one considers it as a separate dwelling-house at that time or not) was in fact earning an income for the landlord which he was quite free to fix and which was presumably the market rental value. If the landlord had let flat No. 28 under a separate lease, the flat would clearly be a controlled flat by reason of its rateable value of 79*l.*, and its standard rent today would be the rent then fixed. It is true that no separate rent was fixed in 1939, but I see no reason to doubt that the rent then fixed by the landlord and charged for these two identical flats was approximately double the rent that would have been charged for each individual flat, that is, 171*l.* 5*s.* 0*d.*, which is the rent fixed by the judge as the standard rent. It seems to me, therefore, that this judgment is in accordance with one of the main objects of the Rent Restriction Acts as set out in the preamble to the Act of 1915, namely, " to restrict the increase of the rent of small dwelling-" houses."

But the first question to be decided is whether flat No. 28, which at all material times was a dwelling-house or part of a dwelling-house, was in fact " let " on September 1, 1939. I venture to think that if anyone had asked the landlord in 1939 whether flat No. 28 was let, he would have answered " Yes." I know of no decided case which has laid down that a flat is not let because it has been let with another flat under one lease. On the contrary, the decision of the Court of Appeal in *Upsons Ld.* v. *Herne* (1), clearly decides the opposite. The relevant facts in that case, in so far as they resemble the facts

(1) [1946] K. B. 591, 594.

in the present case, were that until after 1914 two flats, one of which was called flat 2A, together with a shop, were let to one Klein under a single lease at an annual single rent of 150*l*. The three buildings were covered by one roof, but were in all other respects separate. In 1925 flat 2A, the rateable value of which had at all material times been below the limits fixed by the Rent Acts, was let separately to another person, and the question at issue was whether the standard rent of flat No. 2A was the rent under the separate letting, or whether it was to be fixed by apportionment of the rent of the complex of premises.

The Court of Appeal held that the rent was to be fixed by apportionment. Morton L.J., in his judgment said: "This "separate dwelling flat No. 2A was let to Woolf Klein in 1911 "and it was still let to him on August 3, 1914. True, two other "premises were included in the letting and the three were let "in one lease at one rent instead of in three separate leases "at three separate rents, but I cannot see how that prevents "flat No. 2A from being 'let' within the meaning of the "Act of 1920. Presumably the three premises were let at "a rent which was thought by lessor and lessee to be the fair "aggregate annual rental for the three; but, whether this "is so or not, I see no escape from the view that if three pro"perties, A, B and C are let by X to Y under one and the same "lease, then each one of them is let by X to Y."

The only material difference that I can see between the facts in that case and those in this case is that here a doorway was cut in the wall which divided the two flats; but in my opinion the principle enunciated by Morton L.J. applies with equal force to the present case. The judgment in the Court of Appeal in *Upsons'* case (1) accorded with the decision of the Court of Appeal in *Sutton* v. *Begley* (2).

The relevant facts in *Sutton* v. *Begley* (2) were that a house consisting of 19 rooms was let to the defendants at an annual rent of 100*l*. (the standard rent). In June, 1921, the defendants sublet to the plaintiff four rooms at a rent of 80*l*. a year, and the plaintiff afterwards applied to have his rent apportioned for the purpose of determining his standard rent. The Court of Appeal, affirming the Divisional Court and the trial judge, held that the standard rent was to be fixed by apportioning the rent of 100*l*., and was not 80*l*. The basis of their

(1) [1946] K. B. 591.
(2) [1923] 2 K. B. 694.

decision was that the four rooms first let separately to the plaintiff in June, 1921, had been in fact let (as part of the whole house) in August, 1914.

Bankes L.J. in his judgment in *Sutton* v. *Begley* (1) referred with approval to the decision of the Divisional Court in *Marchbank* v. *Campbell* (2), given on the same day as the decision in *Woodhead* v. *Putnam* (3). Bankes L.J. also referred with approval to the decision of the Divisional Court in *Rex* v. *Judge of Marylebone County Court* (4). In that case Salter J., delivering the judgment of the court, said: "The jurisdiction" [to apportion under s. 12, sub-s. 3 of the Act of 1920] "is "given subject to two conditions only. The applicant must "prove that the dwellinghouse, the subject of the tenancy "between the parties, is within the Act, and that it is necessary "for the purpose of determining the standard rent of that "dwellinghouse to make an apportionment, at the appropriate "date, of the rent of the property in which that dwelling-"house is comprised. If those two things are proved, juris-"diction to make the apportionment is given in plain terms."

If the decision of the judge that flat No. 28 was let in September, 1939, is right, it seems to me that the question whether s. 12, sub-s. 3 of the Act of 1920 applies in a case where the rateable value of the whole property exceeded 100*l*. in September, 1939, is irrelevant, just as in my opinion the rental value of the whole property in the cases cited by me was irrelevant.

The reasons given for the decisions to which I have referred seem to me the same as those which were stated by Morton L.J. in *Upsons'* case (5) from which I have quoted. If the question is whether the rooms or the flat in question were "let" or not, it seems to me that the only relevance of the amount of the rateable value of the whole property is that it is a total sum which it is necessary to apportion in order to see whether the rateable value of the rooms or flat in question are within the limits of the Rent Restriction Act now in force. I am therefore in favour of dismissing the appeal.

DENNING L.J. Although these two flats were originally built as separate flats, they were made into one flat before they were let at all; and they were let as one separate dwelling from 1934 to 1942. That one flat, by reason of its rateable value, was outside the Rent Acts. In 1942 it was made into two flats which were afterwards let separately. Each of the separate flats is, by reason of its rateable value, within the Rent Acts. The question is: What is the standard rent of each flat? Is it the rent at which each was first let? Or is it an apportioned part of the 1939 rent of the one whole flat? The solution to this question cannot depend on the fact that they were originally built as separate flats. The problem would be just the same if there were one whole house, built for one family, and let as one whole from 1934 to 1942, the whole house being outside the Rent Acts, and then, in 1942, it were turned into two flats let separately, each within the Acts. In such a case it is quite clear that the landlord could have let the whole house in 1942 at an unrestricted rent, not limited to the 1939 rent. Is he not entitled, then, to let the two flats on their first lettings in 1942 also at unrestricted rents, so that the first rent of each is its standard rent? That is the question, and it is the question which I propose to consider.

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(1) [1923] 2 K. B. 694.
(2) [1923] 1 K. B. 245.
(3) Ibid. 252.
(4) Ibid. 365.
(5) [1946] K. B. 591.

Upon this question, I venture to think that the position under the new control is very different from what it was under the old control. Under the old control of houses which followed the war of 1914, it was eventually settled, after five years of controversy, that although a whole house was outside the Acts by reason of its rent or rateable value, nevertheless, if it were subsequently let in parts, you could apportion the rent or rateable value of the whole so as to find what were the appropriate rents or rateable values for the various parts. It was always understood, however, that the only justification for this apportionment (where the whole house was outside the Acts) was because it was "necessary" to apportion in order to find out whether the various parts were within the Acts. The important thing to remember is that in those days the application of the Acts to any part depended not only on the rateable value of the part but also on its rent; and so you had to apportion both the rateable value and the rent of the whole house in order to find out whether the Act applied to the part or not.

That was decided as to rateable value by *Barrett* v. *Hardy Brothers* (*Alnwick*) *Ld.* (1) Scrutton L.J. said that s. 12, sub-s. 3 of the Act of 1920 applied "to cases where it is necessary to "apportion to find out whether the case is within the Acts"; and it was decided as to rent by *Phillips* v. *Potter* (2), where

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(1) (1925) 2 K. B. 220, 228.

(2) (1925) 41 T. L. R. 460, 462.

Greer J. said: "Apportionment of the rent at which the entire "house was let on August 3, 1914, is the only way in which it "can be ascertained whether the Act applied to the respondent's dwelling-house or not." Once the rent was apportioned, the appropriate portion became, of course, the standard rent of the part; but nevertheless the only justification for the apportionment was not to find the standard rent simpliciter, but to find if the part was within the Acts or not.

Under the new control of houses which has followed the war of 1939, the application of the Acts depends only on the rateable value and not on the rent. It is therefore no longer "necessary" to apportion the rent of the whole in order to see whether the various parts are within the Acts, because the rent has no longer anything to do with it. It is only necessary to apportion the rateable value. The Act of 1939 clearly recognizes this, because it contains an express provision in s. 7, sub-s. 2, which shows that you can apportion the rateable value of the whole in order to find the rateable value of the part, even when the whole is outside the Acts; but, significantly enough, there is no such provision enabling you to apportion the rent. The reason is because it is no longer necessary to apportion the rent in order to find out whether the part is within the Acts or not. Once the reason for apportioning the rent disappears, the right to it also disappears: cessante ratione, cessat lex. The only ground on which the tenant can now claim an apportionment of rent—where the whole house is outside the Acts and the part within them—is by saying that it is "necessary" to apportion the rent of the whole in order to find the standard rent of the parts. This is an entirely new ground, which will not bear examination because there is in truth no such necessity. The standard rent of any part can be perfectly well ascertained by taking the rent at which it was first let after 1939. If the owner had occupied the whole house himself until 1942, and then let it in parts, the standard rent of each part would have been the rent at which it was first let. The fact that he let the whole house to a tenant occupier until 1942 can make no difference, seeing that the house was outside the Acts altogether. That letting only makes it *possible* to apportion. It does not make it "necessary" to do so; and it is only if it is *necessary* that the court has any jurisdiction to do it.

This view is strikingly confirmed by s. 5 of the Act of 1938. That is an express provision for how you are to find the standard rent of parts of a house. It says that, whenever the whole house is within the Acts, you apportion the standard rent of the whole in order to find the standard rent of the parts. The plain inference is that, when the whole house is outside the Acts, you do not apportion. This is a very sensible distinction: the owner of a controlled house ought not to be allowed to get more rent for his house by letting it in parts instead of one whole; and a tenant of a controlled house ought not to be allowed to make a profit by sub-letting at a higher rent than he is paying himself. So you apportion the whole to find the rent of the parts.

But none of this applies where the whole house is outside the Acts. The owner of an uncontrolled house can let it at whatever rent a tenant is prepared to pay. Why, then, should he not be able to let it in parts at whatever rents the various tenants are prepared to pay? I see no reason why not. Nor, apparently, did the legislature when it passed the Acts of 1938 and 1939. In the Act of 1938 it provided for apportionment only in cases where the whole house was one "to which "those Acts apply." The Act of 1938 was the first Act, be it noted, where the application of the Rent Acts was made to depend on rateable value and not on the rent; and it was the first Act in which the legislature provided for an apportionment of rent although it was not "necessary." It said that there should be an apportionment whenever the whole house was within the Acts, but not when it was outside them. Then, when the legislature introduced the new control in the Act of 1939, based solely on rateable value—so that there was no necessity to apportion the rent—it retained s. 5 of the Act of 1938 intact and made it applicable to the new control. Numerous minor amendments were made in the various Acts, but the important words "to which those Acts apply" were retained. If the legislature did not see fit to strike them out, I do not see why we should do so. But that, after all, is what the tenant asks us to do. In order to ascertain the standard rent of a part, he wants us to apportion the rent of the whole, whether the whole house is within the Acts or not; whereas s. 5 only authorizes us to do it when it is within the Acts.

If the result of this case were to be that the landlord could charge an extortionate rent for these two flats on their first letting, I should, I expect, be tempted to depart from the interpretation which I have given to these Acts, just as the courts were tempted between 1920 and 1925. They succumbed to the temptation and afterwards regretted it, as Bankes L.J. frankly acknowledged: see *Barrett's* case (1). But we are not subjected to any such temptation: the Landlord and Tenant (Rent Control) Act, 1949, now provides an effective check against extortionate rents on first lettings: if the tenant considers the rent to be unreasonable, he can apply to the rent tribunal for a reduction, and they will reduce it to whatever is reasonable. That is a remedy which gives him justice, and I feel no inclination to give him more.

There are no cases which give rise to any difficulty. All the cases under the old control are beside the mark for the reasons which I have stated. *Upsons Ld.* v. *Herne* (2), although decided in 1946, was a case of old control. It was one of the very rare cases in which a court of to-day had to find the standard rent of a flat just as a court sitting in 1925 would have had to do; and it did it by apportioning the 1914 rent of the property in which it was comprised. The case has no bearing whatever on cases under the new control. *Lindop* v. *Quaife* (3) is distinguishable because, although that was a case of new control, the application was to apportion the rateable value and not the rent. In that case, as in the present, the standard rent of the flats should be ascertained at the figures at which they were first let, subject to reduction by the Tribunal if they are unreasonable. *Field* v. *Gover* (4) and *Mitchell* v. *Barnes* (5) were cases of new control when the whole house was, by reason of its rateable value, within the Acts, and where the rent had therefore to be apportioned under s. 5 of the Act of 1938.

My conclusion is that in cases under the new control—which means nearly all cases nowadays—the question of apportionment depends not only on s. 12, sub-s. 3 of the Act of 1920, but also on s. 5 of the Act of 1938 and s. 7, sub-s. 2 of the Act of 1939. These new sections throw much light on the obscurities of s. 12, sub-s. 3 which perplexed a previous generation of judges. They show that rent—as distinct from rateable value—is only to be apportioned when the whole house is within the Acts. This one whole flat was not. It is not "necessary" to apportion the rent. The standard rent of each flat is the rent at which each was first let. In my opinion, therefore, the appeal of the landlords should be allowed.

(1) [1925] 2 K. B. 223.
(2) [1946] K. B. 591.
(3) [1949] 1 All E. R. 456.
(4) [1944] K. B. 200.
(5) [1950] 1 K. B. 449.

HODSON J. [after stating the facts]. The landlords contend that, when a house outside the Acts in 1939 is sub-divided into separate dwellings, the standard rent of those dwellings is not found by apportionment of the rent of the uncontrolled unit, but by taking the first rent at which the parts were let as giving their standard rent. The correct principle, it is said, is that a landlord cannot get more by letting the house piecemeal than by letting it as a whole ; but, if the whole is uncontrolled, he should not be penalized because he splits it up. As a secondary principle, it is said, you should not look at anything outside the Acts (business rent or furnished rent), but you should look at the rent of the character contemplated by the Acts : see *Signy* v. *Abbey National Building Society* (1). Therefore, it is argued, you should not calculate a controlled rent by reference to an uncontrolled rent. The standard rent should accordingly be fixed by reference to s. 12, sub-s. 1 of the Act of 1920, and no apportionment under s. 12, sub-s. 3 is necessary. The tenant, on the other hand, argues that s. 12, sub-s. 3 must be given its widest possible interpretation in favour of the tenant, in accordance with the policy of the Acts, part of which is to protect tenants of small dwelling-houses from paying excessive rent.

The argument of the landlords is supported by reference to s. 5 of the Act of 1938, which is imperative in requiring apportionment in order to ascertain the standard rent of a controlled dwelling-house which forms part of another controlled dwelling-house. This section reads as follows : " Where a dwelling-house to which the principal Acts apply " is part of another dwelling-house to which those Acts apply, " the standard rent of the first-mentioned dwelling-house " as from September 29, 1938, shall be a standard rent ascer- " tained by apportioning the standard rent of the second- " mentioned dwelling-house, and sub-s. 3 of s. 12 of the Act " of 1920 shall apply accordingly notwithstanding that the " first-mentioned dwelling-house was let as a separate dwelling " on or before August 1, 1914, or on or before the date on " which the second-mentioned dwelling-house was first let." If the principle of apportionment is to apply in this case, the words " to which these Acts apply " are, it is said, otiose.

It is contended that, if s. 12, sub-s. 3 of the Act of 1920 and s. 5 of the Act of 1938 be read together, the containing house, unless it is within the Acts, is not the basis of apportionment. Reliance is also placed on this dictum of Scott L.J. in *Field* v. *Gover* (1): " . . . . and I think (not without " doubt) that s. 12, sub-s. 3, of the Act of 1920 is on that point " to be construed on the same lines, that is to say, that there " is not to be apportionment unless both houses—the con" taining and the contained—are within the Acts."

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(1) [1944] K. B. 449.

It is at this point, however, that the difficulties in the way of the landlords' argument appear to begin.

In the first place, this dictum has been criticized by the Court of Appeal on more than one occasion: see *Upsons Ld.* v. *Herne* (2), per Morton and Somervell L.JJ., and *Lindop* v. *Quaife* (3), per Bucknill L.J. These criticisms were based on *Barrett* v. *Hardy Bros.* (*Alnwick*) *Ld.* (4), in the Divisional Court consisting of Bankes and Scrutton L.JJ., which was concerned, not with fixing rent, but with apportionment of rateable value in order to ascertain whether a dwelling-house came within the Acts or not.

This decision is well established, although the wording of sub-s. 3 of s. 12 of the Act of 1920, as Scrutton L.J. pointed out, is not really apt to cover such a case: " The statutory " authority for apportionment is to be found, if at all, in s. 12, " sub-s. 3 of the Act of 1920. This begins: ' Where, for the " ' purpose of determining the standard rent or rateable value " ' of any dwelling-house to which this Act applies.' As " whether a house is within the Act depends on whether its " standard rent or rateable value exceeds a certain limit, this " section, literally read, runs round in a useless circle. You " cannot know whether the Act applies to the house till you " know its standard rent or rateable value. If you have not " determined these items, there is no proof that the Act applies " to it. It is said that you must read the words as if they said: " ' Where in order to determine the standard rent or rateable " ' value of any dwelling-house for the purpose of seeing " ' whether this Act applies to it, it is necessary to apportion, " etc. The words obviously do not say that in their ordinary " meaning."

It is argued by the landlords that the *Barrett* v. *Hardy Bros.* (4) principle is only applicable when it is necessary to ascertain whether or not a house comes within the Acts. In this way it is sought to explain the wide language of Salter J. in *Woodhead* v. *Putnam* (5), when he said: " To entitle a

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(1) [1944] K. B.200, 206.
(2)[1946] K. B. 591.
(3) [1949] 1 All E. R. 456.
(4) [1925] 2 K. B. 220.
(5) [1923] 1 K. B. 252, 256.

"tenant to apportionment under s. 12, sub-s. 3, it is not "necessary that the 'property' in which the applicant's "dwelling-house is 'comprised' should itself be a dwelling-"house or should be subject to the Act." This language, approved by Bankes L.J. in *Barrett* v. *Hardy Bros.* (1), refers to apportionment of rent and not to rateable value, and the landlords can only avoid their full implication by the argument that at that date not only rateable value but rent also were the basis of control, so that apportionment might be necessary at the date of the decision in both cases in order to ascertain whether or not a particular dwelling-house came within the purview of the Acts. Since 1933, on the other hand, rateable value only is the basis of control, so the *Barrett* v. *Hardy Bros.* (1) principle need only now be applied to rateable value.

This argument is deserving of attention, and has the added attraction that it would seem to produce a result not inflicting unfair hardship on landlords. It is necessary, however, to recognize that the dictum of Scott L.J. in *Field* v. *Gover* (2) was too wide, apart from consideration of *Barrett* v. *Hardy Bros.* (1). The words "to which these Acts apply" in s. 5 of the Act of 1938 are not otiose, but the converse of the section must be correctly appreciated. The converse is not that apportionment is not to be applied when the containing house is outside the Acts (as Scott L.J. thought); but in such a case apportionment is to be applied only when it is necessary: see the express terms of s. 12, sub-s. 3 of the Act of 1920 to that effect. This subsection has never been repealed.

In *Upsons Ld.* v. *Herne* (3) it was necessary to apportion. The facts were as follows, to quote the headnote in the Law Reports: "By an agreement in writing, dated April 4, 1938, "the plaintiffs, Upsons Ld., let to the defendant, Henry "Herne, a flat known as No. 2A Golders Way, Golders Green, "for one year commencing on April 11, 1938, and thereafter "from year to year at the annual rent of 78*l.* The rateable "value of the flat was 33*l.* and the Rent Restrictions Acts "applied. This agreement contained a proviso for re-entry "without giving notice to quit if the rent should be in arrears "for 21 days or upwards. The defendant having fallen into "arrears with the rent, the plaintiffs took proceedings for "recovery of possession and arrears of rent but an order in "their favour was set aside by the Court of Appeal and a new

(1) [1925] 2 K. B. 220.
(2) [1944] K. B. 200, 206.
(3) [1946] K. B. 591.

"trial ordered with fresh particulars of claim and defence "before a different judge. The new trial came on on "January 15, 1946, but was adjourned till February 26, 1946, "owing to the plaintiffs' failure, through a mistake, to attend. "The plaintiffs claimed to recover possession and 289*l.* 19*s.* 6*d.* "arrears of rent down to October 4, 1945. The defendant "denied that he was indebted to the plaintiffs and relied on "the Rent Restrictions Acts, contending that the standard "rent of the flat did not exceed 45*l.* per annum exclusive of "rates. Alternatively, the defendant set up an alleged arrange- "ment on April 13, 1942, varying the terms of his tenancy "but this contention failed. There was evidence that the "entire premises consisting of flats Nos. 2A and 2B with a shop "underneath them were let to one Woolf Klein in September, "1911, for a term of 21 years at a rent of 150*l.* per annum, "that the two flats and the shop were completely separated "from each other with separate entrances and that in 1925 "the plaintiffs having become possessed of the premises let "flat No. 2A to one Curry at the rent of 100*l*, per annum."

On those facts the court had to determine what was the rent at which the flat in question was let on August 3, 1914. It was not then let by a separate lease, but as part of a containing building let as one unit at a rental including a shop and another flat. Even though the containing building was outside the Acts, it was necessary, as the court pointed out, to find the standard rent by apportionment.

The ratio decidendi of that case is, in my opinion, that it was necessary to apportion because the containing unit had been previously let on the material date, and had nothing to do with the question whether or not the larger unit was outside the Acts. This, I think, is apparent from the reference of Morton L.J. to *Sutton* v. *Begley* (1). In that case, as in the one now under consideration, there had been no substantial reconstruction or alteration, and the rooms first separately let in June, 1921, had been let in the same condition in the previous March, but as part of a large house. Scrutton L.J. said (2): "To hold that in these circumstances the rent at which the "whole house was let is not to be regarded, but only the rent "at which the room or rooms were first let, which is subject "to no restriction except the agreement between the parties, "would be entirely to defeat the operation of the Act. The "Act was intended to protect small tenants without much

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(1) [1923] 2 K. B. 694.

(2) Ibid. 702

"regard to their landlords' interests. If a landlord who had "let a house, say at 10*l.* a year, was allowed immediately to "let each separate room at 10*l.* and to justify so doing on the "plea that he was letting a room for the first time, whereas "previously he had let the whole house, the Act would be "reduced to a nullity. Therefore it appears to me impossible "to give to the word 'dwelling-house' in s. 12, sub-s. 1 (*a*) "a meaning which, in the case I have just put, would include "the one room subsequently let and exclude the rest of the "house."

These two cases, which are binding on this court, lead me irresistibly to the conclusion that necessity to apportion depends on whether or not the dwelling-house which is the containing unit was let, irrespective of whether it is within or without the ambit of the Acts. I would only add that the argument put forward on behalf of the landlords based on s. 5 of the Act of 1938 loses much of its force when attention is drawn to the later part, which reads: "Sub-section 3 of "s. 12 of the Act of 1920 shall apply notwithstanding that the "first-mentioned dwelling-house"—that is, *the part*—"was "let as a separate dwelling on or before August 1, 1914, or "on or before the date on which the second-mentioned dwelling-"house"—that is, *the whole*—"was first let." This section was clearly introduced to meet the anomalous case illustrated in *Platman* v. *Frohman* (1), which led to the conclusion that, if the part had been separately let before the whole on or before the material date, it would have had a standard rent of its own and there would have been no apportionment.

In this case the containing house was let at the material date, namely, September 1, 1939, at a rent of 342*l.* 10*s.* 0*d.*, and flat No. 28 was also then let. In my judgment apportionment is accordingly necessary, and I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to
House of Lords.

Solicitors: *Stephenson, Harwood & Tatham*; *Laytons.*

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(1) [1929] 1 K. B. 376.

A. W. G.

1950
Apl. 26.

FLOCKHART *v.* ROBINSON.

Lord Goddard C.J.,
Morris and
Finnemore JJ.

Public order—Public procession of political character—"Organize"—Meaning—Public Order Act, 1936 (1 *Edw.* 8, *&* 1 *Geo.* 6, *c.* 6), *s.* 3, *sub-ss.* 2, 3, 4.

The defendant, an official of a political party, organized a public procession of a political character in the City of London, and it dispersed at Temple Bar. At that time an order was in force made by the Commissioner of Police of the Metropolis under s. 3, sub-s. 3, of the Public Order Act, 1936, prohibiting the holding of public processions of a political character in the Metropolitan police district. Later the same day the defendant assembled members of the party at Knightsbridge in connexion with a sales campaign for the party's newspaper, and then went to Hyde Park Corner where he met other officials of the party and some 150 members, most of whom had taken part in the lawful procession in the City. The defendant, as the senior official present, then walked eastwards along Piccadilly followed by all the others in loose formation. After a traffic check at Down Street, the defendant's followers were in a compact body marching in ranks in close formation behind him and thus became a public procession of a political character, though that occurred spontaneously and without any previous arrangement. At each traffic crossing the defendant made the appropriate warning signals to his followers. As the procession approached Piccadilly some of the participants shouted political slogans. When a police inspector stood in front of the defendant and shouted to the procession to break up, the defendant walked past him followed by the rest. He signalled to them to follow him out of Piccadilly Circus into Coventry Street, and they were then broken up by the police. The defendant having been charged with having "organized" a public procession of a political character, contrary to s. 3, sub-s. 3, of the Act of 1936,

Held (by Lord Goddard C.J. and Morris J., Finnemore J. dissenting), that, as the essence of a procession was that it proceeded along a route, the person who directed its route was the person who organized it; that the events, subsequent to the traffic check at Down Street, in which the procession maintained its formation through the defendant's leadership constituted evidence on which the magistrate could find that the defendant had organized the procession; and that he was accordingly properly convicted.

Per Finnemore J. The fact that the defendant was the leader of the procession was not enough to constitute him its organizer. The evidence being that, before the traffic check at Down Street, he had not organized the procession in any way and that it then formed spontaneously, no such change took place in it thereafter as made it possible to say that the defendant had organized it. The fact that he then led it on and round Piccadilly Circus still did not make him its organizer, because to organize meant something in the nature of planning or arranging.

CASE STATED by the Chief Metropolitan Magistrate sitting at Bow Street Magistrates' Court.

At a court of summary jurisdiction sitting at Bow Street, London, an information was preferred by Chief Superintendent of Police Alexander Robertson against Lawrence Alfred Flockart, alleging that on October 15, 1949, at Piccadilly and elsewhere within the Metropolitan police district he organized a public procession of a political character contrary to an order prohibiting such processions made by the Commissioner of Police of the Metropolis under s. 3, sub-s. 3 of the Public Order Act, 1936.(1).

On the hearing of the information the following facts were proved or admitted :—There was in force at all material times an order dated October 3, 1949, made by the Commissioner of Police of the Metropolis with the consent of the Home Secretary prohibiting the holding of all public processions of a political character within the Metropolitan police district. The defendant was assistant secretary of the Union Movement, an organization having political objects, and was the senior officer of the Union Movement present on the occasion referred to below.

On October 15, 1949, the defendant and others assembled at about 5 p.m. within the boundaries of the City of London, and there the defendant organized a lawful public procession of members of the Union Movement, which procession duly dispersed at Temple Bar at about 6.45 p.m. The defendant issued musical instruments to the band leading the procession, marched at the head of it, and gave verbal commands to those taking part.

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(1) Public Order Act, 1936, s. 3, sub-s. 3 : "If at any time "the . . . . Commissioner of "Police of the Metropolis is of "opinion that, by reason of "particular circumstances existing in his police area . . . . "the powers conferred on him "by subsection 1 of this section "will not be sufficient to enable "him to prevent serious public "disorder being occasioned by "the holding of public processions "in that area . . . . he may with "the consent of the Secretary "of State, make an order prohibiting for such period not exceeding "three months as may be specified "in the order the holding of all "public processions or of any "class of public procession so "specified . . . . in the police "area . . . ."

Sub-section 4 : "Any person "who . . . . organizes or assists "in organizing any public procession held or intended to be "held in contravention of an "order made under this section "or incites any person to take "part in such a procession, shall "be guilty of an offence."

Having dismissed that procession, the defendant on the same day assembled a number of members of the Union Movement at Knightsbridge Station, issued copies of the "Union" newspaper to them, and placed the members at the edge of the pavement at regular intervals between Knightsbridge Station and Hyde Park Corner for the purpose of their taking part in a sales campaign for "Union," that being a political newspaper setting out the aims and objects of the Union Movement.

At about 9.45 p.m. the defendant went to Hyde Park Corner and there met officials of the movement accompanied by about 150 members. Most of them had taken part in the procession in the City of London. The defendant then walked eastwards on the north pavement along Piccadilly in company with one Hamer, a member of the organization, and followed by the officials and members to the number of about 150.

The persons following the defendant were at first in loose formation and not in ranks, and did not give the appearance of a compact body of persons. On reaching the junction of Down Street with Piccadilly, the defendant, being delayed by traffic, stepped into the road and made a hand signal to stop those behind him. Those immediately behind him halted and those further back closed up on those in front. When the road was clear, the defendant crossed to the south footway of Piccadilly followed by the members of the organization, and continued walking in an easterly direction. After passing Down Street those following the defendant were in a compact body marching in ranks in close formation immediately behind him. At the junction of Arlington Street with Piccadilly the defendant was again delayed by traffic and again held up his left hand as a signal to those behind him, who halted. When the traffic cleared the defendant crossed Arlington Street followed by the body of persons. At the junction of St. James's Street with Piccadilly he again signalled to those behind him, who halted. He crossed the street when there was a lull in the traffic, still followed by the body of persons.

Outside Simpsons, about 25 yards before entering Piccadilly Circus, the body of persons behind the defendant, but not the defendant himself, began singing a song to the tune of the Horst Wessel or European Marching Song and shouting political slogans. When the singing started Hamer warned the defendant to "hold on" as, once someone started, all would be singing. The defendant took no notice, but continued towards Piccadilly Circus followed by the body of persons.

When the defendant and the body of persons had nearly reached Piccadilly Circus, a police inspector stepped in front of him and them, held out his arms, and said in a loud voice, "Stop this. Break this up." The defendant held up his hand, the body of persons checked, and the defendant then walked past the inspector and moved into the roadway followed by the body of persons in close formation. The defendant turned north and marched round Piccadilly Circus followed by the body of persons in close formation still singing and shouting political slogans.

After parading once round the Circus the defendant gave a direction signal on reaching Coventry Street, which he entered followed by the body of persons. Here they were broken up by police.

For the prosecutor it was contended that on the night in question there was a public procession of a political character along Piccadilly and in Piccadilly Circus; that the procession was illegal by virtue of the Public Order Act, 1936, and the Order made under it; and that the defendant organized the procession contrary to s. 3, sub-s. 4 of the Act.

For the defendant it was contended that no procession was proved to have existed; and that, if there was a procession as contended by the prosecutor, there was no evidence that the defendant had organized it.

The magistrate, being of the opinion that a public procession of a political character was proved to have come into being spontaneously and without any prior arrangement after the persons in question had passed Down Street; that the procession, being within the Metropolitan police district, was by reason of the Order referred to, illegal; that the defendant, as an officer of the Union Movement and the senior officer present, had marched in front of the procession; and that, by giving the signals described to the procession from time to time and by leading the column along Piccadilly and round Piccadilly Circus, he had to that extent organized the procession, held that he was guilty of organizing the procession, contrary to s. 3, sub-s. 4 of the Act of 1936, and convicted him, fining him 10*l*.

The defendant appealed.

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Scarman for the defendant. There was no evidence that the defendant organized the procession. It came into being spontaneously, without any prior arrangement. "Organizing" pre-supposes a plan or prior arrangement: it is not synonymous with being at the head of or taking part in a procession. "Organize" means to arrange or "get up," and here there was no evidence to this effect. The defendant might have been charged with inciting persons to take part in the procession, but the prosecution preferred the more deliberate charge of "organizing." When a limitation has been placed by the legislature on the subject's freedom of action, the limiting words must not be construed narrowly, and the prosecution must state accurately the offence charged.

The defendant took no part in the political side of the procession, which the magistrate found came into being spontaneously. He merely led it and acted as a traffic guide. He cannot be said to have organized a procession of a political character.

Maxwell Turner for the prosecutor. A procession may be organized without prior arrangement. The organizing may take place while the procession is in progress, by giving to it a definite orderly structure. In this case the body of persons began marching in loose formation, but subsequently became a compact body, and then the procession came into being. The defendant, the senior official present, gave directions to those marching behind him, and the magistrate was entitled to find that a procession of a political character was organized by him.

LORD GODDARD C.J. [after stating the facts]. The question here is whether there was evidence that the defendant organized this procession. "Organized" is not a term of art. When a person organizes a procession, what does he do? A procession is not a mere body of persons: it is a body of persons moving along a route. Therefore the person who organizes the route is the person who organizes the procession. That is how I approach this case.

It seems to me clear that, at any rate from the time when these people reached Piccadilly Circus, the defendant was organizing the route for the procession to follow, and that they followed it. Therefore I think that there was evidence on which the magistrate could find that he organized a procession, at any rate after these people reached Piccadilly Circus, for he proceeded to take them round the Circus and then into Coventry Street.

He was organizing the procession because, although he did not organize the body of people, he organized the route. There is no other way of organizing a procession, because a procession is something which proceeds. By indicating or planning the route a person is in my opinion organizing a procession.

For these reasons this appeal in my opinion fails.

MORRIS J. I have come to the same conclusion. The defendant does not contest that there was a public procession of a political character, but it was argued for him that it was not shown that he organized that public procession. The chief magistrate has found that a public procession of a political character was proved to have come into being spontaneously and without any prior arrangement after the persons concerned had passed Down Street. It seems to me, on the facts as found by the chief magistrate, that, when that political procession came into being, the defendant, being the senior officer of the organization present, placed himself at the head of that public procession of a political character and, having done so, organized it: he directed them and they obeyed him. The findings of the chief magistrate show that on many occasions he gave them directions and that on each occasion his direction was followed.

What had happened earlier in the day is also not without significance: the defendant had earlier organized a public procession which was lawful because it was in the City of London. It is the defendant who is found to have organized that procession; and it is found that what he did was to issue the instruments to the band, to march at the head of the procession, and to give verbal commands to those taking part. Therefore, when the defendant, being an officer of the Union Movement, placed himself at the head of the procession which came into being in Piccadilly, he was placing himself at the head of people who had been organized by him earlier in the day, for the chief magistrate finds that most of those present in Piccadilly had taken part in the earlier procession in the City. There was no band in Piccadilly, but otherwise the defendant there did much the same as he had done earlier in the day when in command of the lawful public procession which he did organize: in each case he marched at the head of the procession and gave words or signs of command which were obeyed.

It seems to me that, on the findings of the chief magistrate, there were seven separate occasions when the defendant gave a direction which those behind him followed. [His Lordship referred to the case stated, and continued:] When the inspector held up the defendant and he walked past the inspector and into the roadway followed by the body of persons, he was again giving the lead to those behind him, intending them to follow, which they did.

The act of organizing might in some circumstances take a lot of time and require premeditation. In other circumstances organizing might be speedily done. The organizing by the defendant of this procession which had come into being required very little time because of the circumstances of the day, because of his relationship to those behind him, and because of their common understanding of his leadership. In my opinion, the facts as found by the chief magistrate show that what he was doing did amount to organizing the procession which had come into being. It would by no means follow that, even though the procession had come into being spontaneously and without any prior arrangement, it would continue to be in orderly formation: it might have become disintegrated; but, under the direction and leadership of the defendant, it continued as a procession along the south side of Piccadilly, and those who formed part of it obeyed the defendant over and over again. On those facts there was ample evidence on which to hold that the defendant had organized a public procession, and I am of the opinion that this appeal fails.

FINNEMORE J. With very great diffidence I feel bound to come to a contrary opinion. The defendant was convicted of organizing a public procession of a political character. What "organize" may mean must depend on the facts of each case. The mere fact that a person takes part in a procession would not of itself be enough. I do not think that the fact that the defendant was the leading person in the procession would by itself be enough, although it might be some evidence to be considered.

The difficulty in which I find myself is this: some 150 people belonging to a political body, after certain political activities at Hyde Park Corner, moved towards Piccadilly Circus. The defendant was in front. The magistrate has found that a number of people in loose formation were walking behind him. When they reached Down Street there was traffic in the way. The defendant, being the leading person, held up his hand, on which those following him stopped. When they resumed their walk along Piccadilly they had closed up together, and the magistrate finds that thereafter they were in an orderly formation. At that time, he finds, they became a public procession of a political character; but he finds as a fact that that procession came into being spontaneously and without any prior arrangement. Certainly up to that point, on the evidence, the defendant had not organized this procession in any way at all; and thereafter, it seems to me, that procession never altered. It is true that, on reaching Arlington Street, where there was another traffic block, the defendant held up his hand and the procession stopped, and that when they reached St. James's Street exactly the same thing happened again. But the procession never broke formation; it was never reorganized, or, as it seems to me, organized at all apart from the self-organization at Down Street which the magistrate has found was spontaneous. When they reached Piccadilly Circus the police inspector stepped out and called on them to break formation. The defendant walked past him, and the others, still in the same formation, followed him. They marched round Piccadilly Circus once, and then, on the defendant's signal, followed him into Coventry Street, still in the same formation, still as it seems to me the same procession, and were there finally dispersed by the police.

I think that the finding of the magistrate that this procession formed spontaneously without any prior arrangement after the persons concerned had passed Down Street makes it impossible to say that the defendant had organized the procession, and I cannot see that anything which happened thereafter justifies our saying that at some stage after Down Street he had organized it.

The chief magistrate says that, by giving what were traffic signals, and by leading the column round Piccadilly Circus, the defendant to that extent organized the procession; but I do not think that that is organizing a procession. I think that organizing a procession means something in the nature of arranging or getting up or planning a procession. It is not necessary, of course, for the plans to be made long in advance, or, perhaps, in advance at all. There is certainly no need for persons to meet in a back room and make secret plans. The procession could be organized on the spot in the street; but, on the findings of the chief magistrate, that did not happen: the procession formed itself spontaneously; and I do not think that anything that the defendant did thereafter amounted to

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v.
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Finnemore J.

organizing that procession. True he walked in front of it and took part in it; and it may well be that he disobeyed an order given to him by the police inspector; but I do not think that any of these matters constitutes the offence or the act of organizing a procession.

I am therefore driven to take a different view from the rest of the court.

Solicitors: *Grinling, Harris & Hale, for Marsh and Ferriman, Worthing; The Solicitor, Metropolitan Police.*

L. F. J. McD.

C. A.

1950
May 16, 26.

Lord Goddard C.J., Humphreys and Parker JJ.

REX *v.* BARNET (AND AREA) RENT TRIBUNAL.

Ex parte MILLMAN.

Landlord and tenant—Rent control—Lease—Premium paid "in respect "of grant of lease"—Business premises—Tenancy—Sum paid for goodwill of business—Whether premium—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 18, *sch.* 1, *pt.* 1, *para.* 1.

In 1947 the owner of business premises, to which a substantial goodwill in connexion with the business attached, demised the premises to a tenant and, in consideration of the payment of 1,500*l.* by the tenant, assigned to him the goodwill of the business, and covenanted not to engage in a competitive business within a specified area. The tenant applied to a rent tribunal under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, to fix the standard rent of the premises on the basis that the 1,500*l.* paid for the goodwill of the business was a premium paid before the coming into force of the Act of 1949 in respect of the grant of the tenancy and that, consequently, by sch. I., pt. I., para. 1, the tribunal were required to take into consideration the rental equivalent of the premium when fixing the standard rent. The tribunal made an order determining the rental equivalent.

Held, that, on the true construction of the Act of 1949, a payment, to constitute a premium as defined, must have been made in respect of the grant or continuation of a tenancy; that, whether the sum paid for the goodwill of the business did or did not constitute a premium within the meaning of the definition contained in s. 18 of the Act, as it was a payment made for the genuine purchase of the goodwill of the business against

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a restrictive covenant by the seller not to carry on a similar business, it was not a premium paid "in respect of the grant" of the lease; and that the tribunal therefore had no jurisdiction to fix a rental equivalent for it.

APPLICATION for an order of certiorari.

Before 1947 the applicant, R. Millman, carried on the business of a retail confectioner and tobacconist at No. 289, Lordship Lane, Tottenham, of which he was the freeholder. He lived with his wife above the shop, and in the course of time he had built up a substantial goodwill in connexion with the business. In 1947 he decided to retire and sell the business and, by a lease made in July, 1947, he demised the premises to one L. Montrose for a term of fourteen years (determinable at the option of the lessee at the expiration of the first seven years) at the annual rent of 260*l.*

By a deed of assignment of the same date, in consideration of the sum of 1,500*l.*, of which 1,200*l.* was then paid, he assigned to the tenant all his goodwill, interest and connexion of and in his business and covenanted that he would not at any time thereafter carry on, manage or be concerned or engaged or interested in, the business of a confectioner or tobacconist within a radius of two miles of the demised premises.

On November 7, 1949, the tenant applied to Barnet, &c. Rent Tribunal under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, to fix the standard rent of 289, Lordship Lane, the letting to him having been the first letting. When the tribunal viewed the premises the tenant referred to the payment of 1,500*l.* for goodwill, and the tribunal informed him that under sch. I, part 1, para. 1 of the Act he was entitled to request the tribunal (*a*) to certify that that part of the schedule applied and thereupon (*b*) under para. 10 (1.) of sch. I. to determine the rental equivalent of the 1,500*l.* paid, on the basis that it was a premium paid before the coming into force of the Act "in "respect of the grant, continuance or a renewal of a tenancy of "the dwelling-house to which the application relates."

On March 1, 1950, the tribunal heard the application, in which the tenant referred to the 1,500*l.* as a premium, and determined the rental equivalent as 7*l.* 14*s.* 9*d.* a month and the relevant date as July 9, 1951.

By s. 18 of the Act "the expression 'premium' includes any "fine or other like sum and any other pecuniary consideration "in addition to rent."

The applicant applied for an order of certiorari to bring up and quash the certificate and determination of the tribunal on the ground that the sum paid for goodwill was not a premium within the meaning of the Act and that the tribunal had thus exceeded their jurisdiction.

Bernard Lewis for the applicant. No premium was paid by the tenant in this case, and, that being so, the tribunal had no jurisdiction to determine its rental equivalent. The price paid for the goodwill of the landlord's business was not a premium since goodwill constitutes a separate right of property which can exist quite unconnected with any premises (see *Trego* v. *Hunt* (1) per Lord Herschell). The 1,500*l.* was not, therefore, a pecuniary consideration in addition to rent paid in respect of the grant of the tenancy within the meaning of para. 1 of part I of sch. I to the Act of 1949.

Ashworth for the tribunal. The transaction in the present case was a composite one, and the payment for goodwill was a pecuniary consideration paid in addition to rent. On a right reading of the definition of premium in s. 18, assisted by the provisions of ss. 2, 12, which show when a payment in respect of goodwill may properly be made, one is driven to the conclusion that the payment made in the present case was a premium. That being so, the tribunal had jurisdiction to fix its rental equivalent in determining the standard rent of the premises.

Cur. adv. vult.

May 15. Parker J., reading the judgment of the court, stated the facts, and continued:—This court has already held in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal Ex parte Philippe* (2) that the remedy of certiorari will lie if no premium was in fact paid in respect of the grant, continuance or renewal of a tenancy. It was admitted before us that the tribunal accepted that the assignment of July 9, 1947, was a genuine assignment of the goodwill and that it was worth 1,500*l.* That being so, the only question is whether this 1,500*l.* was a premium paid "in respect of the grant, continuance or "renewal of a tenancy." It was argued on behalf of the tribunal that it was, on the ground that the definition of premium in s. 18 of the Act was very wide and that the words in s. 1, sub-s. 5, "paid in respect of the grant, continuance or renewal "of a tenancy" were wide enough to cover any payment made

(1) [1896] A. C. 7, 17.

(2) [1950] W. N. 304.

on such a grant, continuance or renewal which would not have been made but for the grant.

Reference was further made to s. 2, sub.-ss. 2 and 4 and to s. 12, sub-s. 2. Section 2, sub-s. 2 provides that: "Subject to "the provisions of part II of the first schedule to this Act, a "person shall not, as a condition of the assignment of a tenancy "to which this section applies, require the payment of any "premium in addition to rent." Section 2, sub-s. 4 provides that: "Notwithstanding anything in sub-s. 2 of this section, "an assignor may, if apart from this section he would be "entitled so to do, require the payment by the assignee":—amongst other things "(*d*) where part of the dwelling house is "used as a shop or office, or for business, trade or professional "purposes, of a reasonable amount in respect of any goodwill "of the business, trade or profession, being goodwill transferred "to the assignee in connection with the assignment or accruing "to him in consequence thereof."

Section 12, sub-s. 2 provides that: "Save as hereinafter "provided, a person shall not, as a condition of the grant, re-"newal, continuance or assignment of rights under a contract "to which the Act of 1946 applies, require the payment of any "premium: Provided that this subsection shall not prevent," amongst other things "(*b*) a requirement that there shall be "paid a reasonable amount in respect of goodwill of a business, "trade or profession, being goodwill transferred to a grantee or "assignee in connection with the grant or assignment or accru-"ing to him in consequence thereof."

It is contended that these provisions show that, except where a payment for goodwill is expressly permitted, it constitutes a premium within the meaning of the Act. Why no similar exception is provided in the case of the grant, renewal or continuance of an unfurnished tenancy it is hard to understand and idle to speculate upon.

Be that as it may, we think that before the tribunal can certify and determine a rental equivalent there must have been a premium, as defined by the Act, paid in respect of the grant, continuance or renewal of a tenancy. Even assuming, without deciding, that the 1,500*l.* was a premium within the definition in s. 18, we cannot think that it was paid "in respect of" such a grant. Read in their widest sense the words "in respect of" would cover the payment of money for whatever purpose so long as it could be said that no tenancy would have been granted but for the payment. Thus, the words would cover the purchase

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Rex v. Barnet (and Area) Rent Tribunal. *Ex parte* Millman.

price of the stock taken over or the reimbursement to the landlord of the proportion of any outgoings such as rates, insurance and the like, paid in respect of the period covered by the tenancy. No doubt it may not be easy in some cases to say whether a payment comes within these words, but where, as here, a payment is made for the genuine purchase of the goodwill of a business and against the seller's entering into a restrictive covenant not to carry on a similar business, we do not think that it can be said to have been paid " in respect of " the grant.

In these circumstances, the order of this court is that the certificate and determination be quashed.

Application granted.

Solicitors : *Offenbach & Co. ; Solicitor, Minister of Health.*

P.B.D.

1950

May 15, 16, 17, 18.

Devlin J.

YOUNG *v.* RANK AND OTHERS.

Procedure—Trial by jury—Acceptance of submission of no case—Defendant's election whether to call evidence—Discretion of judge.

When a case is tried before a judge sitting with a jury, the judge has a discretion to entertain and rule on a submission made by counsel for the defendant after the close of the plaintiff's case that there is no evidence to go to the jury, without putting him to his election whether he will or will not call evidence.

ACTION tried by DEVLIN J., with a City of London Special Jury.

The plaintiff brought an action against the defendants for damages for breach of warranty, wrongful dismissal and conspiracy. At the close of the plaintiff's case, counsel for the defendants submitted that there was no evidence on the first and third issues to go to the jury.

DEVLIN J. ruled that he had a discretion to entertain that submission and rule on it without putting counsel to his election whether or not to call evidence, for the principles applicable to cases where the judge is sitting alone did not in his opinion apply to cases where the judge was sitting with a jury.

The case is reported only on that point.

Fearnley-Whittingstall K.C., *Clive Burt* and *Ian Warren* for the plaintiff.

Sir Walter Monckton K.C. and *T. G. Roche* for the defendants

DEVLIN J. I have acceded to the submission by counsel for the defendants that I should withdraw a large part of the case from the consideration of the jury. Part of that submission was based on the contention that there was no evidence on certain aspects of the case fit to go to the jury. I did not, when counsel made that submission, put him to his election whether he would or would not call any evidence, and, consequently, he made no election. He submitted to me, and I think that he was right, that I had a discretion and was not obliged to put him to his election. But the rule on the matter, deducible from the authorities, imposes a duty on the court. I therefore thought it right to consider the authorities myself in order to determine whether or not I was taking the right course.

But for a dictum of Goddard L.J., in *Parry* v. *Aluminium Corporation Ld.* (1) there would be no doubt as to the position on the authorities. Having regard to that dictum, however, I think it right to review the authorities shortly and state my reasons for the course which I took.

In *Marbe* v. *George Edwardes* (*Daly's Theatre*) *Ld.* (2), Bankes L.J., said: " But Mr. Neilson for the defendants " contended that at the end of the plaintiff's case there was " no evidence that the defendants in publishing the letter " were actuated by malice; that it was for the judge to rule " at that stage whether there was evidence to go to the jury, " and that if he had done that the plaintiff must have failed. " That argument has been addressed to the court on several " occasions and it has been held, and I repeat now, that according to the present practice the judge has a discretion whether " he will rule on the matter at the close of the plaintiff's case " or whether he will defer ruling until the whole of the evidence " has been called."

That practice appears to have been fully recognized in *Alexander* v. *Rayson* (3), which laid down the rule to be followed in cases which are tried by a judge alone, namely, that the judge is bound to put counsel who makes the submission to his election. Romer L.J., delivering the judgment of the court, referred to the point in the following terms: " At the " conclusion of the defendant's evidence the plaintiff's counsel " submitted that there was no case to answer upon the two " issues which at that stage had alone been presented to the " court, that is to say, the issues of no consideration and of " illegality. Where an action is being heard by a jury it is, " of course, quite usual and often very convenient at the end " of the case of the plaintiff, or of the party having the onus " of proof, as the defendant had here, for the opposing party " to ask for the ruling of the judge whether there is any case " to go to the jury, who are the only judges in fact. It also " seems to be not unusual in the King's Bench Division to ask " for a similar ruling in actions tried by a judge alone. We " think, however, that this is highly inconvenient. For the " judge in such cases is also the judge of fact, and we cannot " think it right that the judge of fact should be asked to express " any opinion on the evidence until the evidence is completed. " Certainly no one would ever dream of asking a jury at the " end of a plaintiff's case to say what verdict they would be " prepared to give if the defendant called no evidence, and we " fail to see why a judge should be asked such a question in " cases where he and not a jury is the judge that has to determine the facts."

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(1) [1940] W. N. 44, 46.

(2) [1928] 1 K. B. 269, 277.

(3) [1936] 1 K. B. 169, 178.

In *Parry* v. *Aluminium Corporation, Ld.* (1), the Court of Appeal had to consider the same sort of point in relation to a case of negligence determined by a judge alone. Having set out the rule in the same terms in which it was set out by the Court of Appeal in *Alexander* v. *Rayson* (2), Goddard L.J. went on to say: " . . . . In negligence cases he thought, " speaking for himself, that the right course was for the judge " to refuse to rule unless the counsel for the defendant said " he was going to call no evidence. Horridge J., used to say, " if he was sitting with a jury: 'Are you going to call any " 'evidence; or are you going to let the case stay where it " 'is?' If counsel said: 'I am not going to say whether " 'I am going to call any evidence,' then he would say: 'You " 'must call your evidence; and then I will rule whether or " 'not, on the whole of the case, there is a case to go to the " 'jury or not.' If a judge was sitting without a jury, he " did not have to say that, because he could say that he would " decide at the end of the case. His Lordship thought that " the course which he had indicated was the proper course

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(1) [1940] W. N. 44, 46,

(2) [1936] 1 K. B. 169, 178,

"to take in these cases. He did not say it was the right "course in every kind of action, because he had always under-"stood, and, he believed, there was authority for the view, "that in defamation cases, for instance, if it was submitted "that there was no evidence of malice, the judge was bound to "rule; and so, he thought, in slander cases, if the submission "was made that the words were not actionable without proof "of special damage, the judge was bound to rule if no special "damage was alleged. Subject to such exceptions, however, "he thought that the old practice, which he believed most "judges adopted, was the sound practice because it prevented "the chance from arising in such circumstances—it did not "arise here—of a defendant, unsuccessful in this court, asking "that the case should go back for a new trial for the purpose "of having his evidence heard."

The way in which Goddard L.J., stated the rule was apparently accepted by the Court of Appeal in *Laurie* v. *Raglan Building Co. Ld.* (1). The leading judgment of the court was that of Lord Greene M.R., with which Goddard and du Parcq L.JJ., concurred. Again, it was a case where there was no jury, and in the course of his judgment the Master of the Rolls said: "That must be regarded as the "proper practice to follow, and it is to be found very lucidly "set out, if I may say so, in the judgment of Goddard L.J., "in *Parry* v. *Aluminium Corporation Ld.* (2)."

I have given careful consideration to the dictum of Goddard L.J., which might seem to be in sufficiently wide terms to apply the rule to cases tried with a jury. Although Goddard L.J., had before him a case of negligence, he does state what he believes to be the proper practice in jury actions. He sets out certain exceptions in defamation cases and then says that, subject to those exceptions, he thinks that the rule ought to apply. It was not a considered judgment, and I do not think that the Lord Justice can have been intending to overrule what had previously been held to be the practice, and one which had been fully recognized in *Alexander* v. *Rayson* (3). I come to the conclusion, therefore, that I have a discretion which I can properly exercise, and which I did exercise in this case by not putting counsel for the defendants to his election.

Besides the distinction drawn in *Alexander* v. *Rayson* (3) between cases tried by a judge alone and those tried by a jury, there is this further matter which I think of some importance: in a case tried by a judge alone the Court of Appeal has a complete power of rehearing, and if evidence for the defendant has not been taken and the court disagrees with the ruling of the trial judge it is, in effect, prevented from exercising its power of rehearing and has no alternative but to send the case back for re-trial, which will result in additional costs to the parties. In cases of trial by jury, the Court of Appeal has no power of rehearing, and, if the verdict of the jury is set aside for any reason, the court has no power except to send it back for re-trial. Accordingly, it appears to me that one of the advantages which flows from a submission of no case in a trial before a judge alone does not arise in the case of a trial by jury.

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(1) [1942] 1 K. B. 152, 155.
(2) [1940] W. N. 44, 46.
(3) [1936] 1 K. B. 169.

It is, of course, always possible for the judge to postpone giving a ruling until he has taken the verdict of the jury, and that sometimes avoids the necessity of coming back for a new trial but it seems to me that it would logically follow that, if a judge is not going to rule at the end of the plaintiff's case, there is no advantage in ruling at the end of all the evidence, for the reason that, if his ruling were held to be wrong, there would still have to be a new trial. The logical result which follows is that, if he wants to avoid expense, he must take the verdict of the jury, and there can be no question but that it lies in the discretion of the judge whether or not he will take the verdict of the jury and rule afterwards or whether he will rule first. That discretion was clearly recognized in *Turner* v. *Metro-Goldwyn-Mayer Pictures Ld.* (1), in which Lord Porter pointed out some of the disadvantages which arise when the verdict of the jury is taken before the ruling is given.

Accordingly, I came to the conclusion that I had a discretion in this matter, and I exercised it in the way I have stated. The considerations which operated on my mind were these:—it must be borne in mind—and it is always an anxious question for the trial judge to determine—that if his ruling is wrong it may result in additional expense to the parties. On the other hand, I think it not irrelevant to bear in mind that to rule after taking the verdict of the jury is an illogical and sometimes unsatisfactory course, particularly when the questions involved are questions whether or not there is

(1) [1950] W. N. 83, 84.

sufficient evidence to go to the jury. The whole reason why that question is retained in the hands of the judge as a matter of law is that a jury, not being trained by a lifetime of experience to weigh evidence, may easily be misled on matters of that sort. It seems to me that it may be undesirable to leave a point of that sort to a jury, to sum up to them on the basis that there is some evidence to be considered on both sides—and the case cannot be summed up on any other basis—and then, when they have returned a verdict, to overrule it by holding that there was no such evidence. It is not a very satisfactory result for one party to feel that he has the verdict of the jury but that it is being overruled. I think also that a party who feels that no prima facie case has been made out against him ought, unless there is weighty consideration to the contrary, to be entitled to make that submission and have it determined, and not be obliged to submit himself or his witnesses to cross-examination in order that the plaintiff may, if he can, make out a case in that way.

Overriding all those matters, there is always a question of costs to the parties, and, on balance, in this case I came to the conclusion that in all probability—and it is a matter about which I must speculate—the costs would be made less by my taking the course I did rather than the other course.

His Lordship then gave in detail his reasons for accepting the submission of no case.

Solicitors: *Warren and Warren; Richards, Butler & Co.*

L. F. J. McD.

WRIGHT *v.* CALLWOOD.

C. A.

1950
May 1, 2.

Cohen, Asquith and Denning L.JJ.

Highways—Animals—Calves driven by farmer from highway into drive towards yard—Escape back into highway—Injury to cyclist—Liability.

A farmer drove two calves from his field on to the highway and thence through his gateway on the other side of the highway (leaving the gates open), up his 50 feet drive, towards or to his farm yard. The engine of an egg-collecting lorry in the yard was started up, and the calves took fright and raced back down the drive on to the highway, followed by the farmer. One of the calves on emerging on to the highway collided with a cyclist, knocking her off her bicycle and causing her personal injury.

C. A.

1950

WRIGHT
v.
CALLWOOD.

The cyclist sued the farmer in the county court, claiming damages on the ground that the calves were negligently driven and controlled. She called a veterinary surgeon who said that a calf runs away like a young horse ; matured animals were more sedate. In cross-examination, he said that he would have used three men to drive the calves : one to bring them out, a second to turn them the way that they should go, and a third to turn them into the drive. One man in the drive would ordinarily be adequate, but when they arrived at the yard more would be required. The defendant called no evidence, relying on the decision in *Searle* v. *Wallbank* [1947] A.C. 341 that there was no duty on the owner or occupier of land adjoining a highway to prevent animals, which were not dangerous, from escaping on to the highway.

The judge found that the transit of the calves on the highway had terminated : the defendant had got them safely on to his private property from which they had escaped on to the highway where they did damage. He also found that the defendant drove these calves towards or to a place where he knew that there was a motor lorry which, it was likely, would be started up at any moment, the noise being likely to startle the calves and make them run wild. The defendant should therefore have closed the gates on to the highway, when the calves had passed into the drive, or have used another man to assist him in controlling the calves, and was accordingly liable to the plaintiff.

Held, by COHEN and ASQUITH L.JJ., DENNING L.J. dissenting, that, while the county court judge had found that the transit on the highway had terminated so that no duty was owed by the defendant on the basis that the transit was still in progress : see *Deen* v. *Davies* [1935] 2 K. B. 282, and while there was evidence to support that finding, there was no evidence to support his finding that, when the defendant was driving the calves into the drive, he knew that the motor lorry was in his farm yard.

Accordingly, there were no special facts to bring the case within the principle laid down by Lord Atkin in *Fardon* v. *Harcourt-Rivington* (1932) 146 L. T. 391 that a person must take care that his animal is not put to such a use as is likely to injure his neighbour —the ordinary duty to take care in the cases put upon negligence and a duty quite apart from that imposed on him by reason of his knowledge of the animal's propensities. Therefore the defendant, since there was no duty on him to fence his cattle from the highway —see *Searle* v. *Wallbank* (supra)—was not liable.

Per DENNING L.J., dissenting. The finding of negligence should not be disturbed, since there was a duty on the defendant to take care. It followed from *Deen* v. *Davies* (supra) that if a farmer drove calves into a yard—either his own or another's—adjoining a highway, his duty was to take reasonable care until they were safely tied up or the yard gate was shut. In this case they had not been brought to safety. It was plain that the 50-foot journey to the yard involved possible encounters with motor traffic. In the absence of evidence by the defendant, the court was entitled to draw the inference against him that he knew of the presence of the motor lorry.

APPEAL from Crewe and Nantwich county court.

The defendant, Harold D. Callwood, owned a farm on the left of the highway from Nantwich to Audlem. The gate opened on to a drive some fourteen feet wide and fifty feet long leading to the farmyard. The defendant also occupied a field on the opposite side of the highway, the gate of which was some few yards nearer Nantwich than the gates to the farmyard.

At 3.45 p.m. on May 12, 1949, the plaintiff, Margaret Wright, was cycling along the highway towards the farm from the direction of Nantwich when she saw the defendant fetch two calves from the field, drive them the few yards to the right along the highway and then to the left through the gateway and up the drive, the gates being, she said, as always, open. The plaintiff cycled on, and, when she was level with the gateway to the drive, one calf rushed out from the farm gateway about a yard in front of her bicycle, then the second calf also rushed out and knocked her off the machine. The defendant was close behind the calves with a stick. He explained to the plaintiff that tnere had been an egg lorry in his farmyard, and that, as he was driving the calves into his farmyard, its engine had started and frightened the calves, which had rushed back down the drive, he following them. The plaintiff sued the defendant for damages for her personal injuries.

James Wilson, M.R.C.V.S., called for the plaintiff, gave expert evidence that a calf runs away just like a young horse; that matured animals are more sedate; and that a farmer driving calves should take added precautions and needs more men to drive them. Cross-examined, he agreed that a calf was a tame animal and said that he should employ three men to drive calves: one to bring them out, a second to turn them the way which they should go, and a third to turn them into the drive. One man in a drive would be adequate ordinarily, but, when they got into the yard, more than one man was required. The defendant by running to overtake the calves did nothing but what he ought to have done.

The defendant called no evidence, relying on *Searle* v. *Wallbank*(1).

Judge Sir Edwin Burgis, gave judgment for the plaintiff for 48*l*. The material part of his judgment is set out in the judgment of Cohen L.J.

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(1) [1947] A. C. 341.

The defendant appealed.

Berryman K.C. and *Brabin* for the defendant. The trial judge found that the transit of the calves on the highway had ended: that was a question of fact for him, and there was evidence to support his finding. This case, therefore, is not affected by the decision in *Deen* v. *Davies* (1) which was referred to by the county court judge, where the finding was, on the contrary, that the transit on the highway had not terminated and was still in progress. Accordingly, since there is no duty on the owner or occupier of land adjoining a highway to prevent animals which are not dangerous from escaping on to the highway, there was no liability on the defendant for the plaintiff's injury : see *Brackenbrough* v. *Spalding Urban District Council* (2), *Hughes* v. *Williams* (3) and *Searle* v. *Wallbank* (4).

The facts here do not afford ground for a finding of negligence. As Lord Cave L.C., said in *Newton* v. *Guest, Keen and Nettlefolds Ld* (5) : " Where a broad principle has been decided by this " House, it seems to me very undesirable that it should be " frittered away by fine distinctions." The trial judge found as a fact that the defendant when he drove the calves into his drive—for that is the material time—knew that the egg-collecting lorry was in his farmyard. But of that there was no evidence. There was no evidence where the farmer had been before he collected his calves from the field on the opposite side of the road, or that the lorry called at the farm at any particular time. The judge bases his finding of negligence, i.e. that the defendant should have shut the gates from the drive on to the highway or utilized the services of another man, on the defendant's possessing this knowledge of the presence of this lorry in the yard and the likelihood of its engine being started up, so making a noise which would frighten the calves.

The lack of evidence on which the judge could base his finding that the defendant knew then of the presence of the lorry vitiates his decision. As Goddard L.J. said in *Hughes* v. *Williams* (6) : " If he is under no duty to keep his animals " off the highway, it seems difficult to understand how " negligence comes into the picture at all, at any rate, negligence

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(1) [1935] 2 K. B. 282.
(2) [1942] A. C. 310.
(3) [1943] K. B. 574.
(4) [1947] A. C. 341.
(5) (1926) 135 L. T. 386, 387.
(6) [1943] K. B. 574, 579.

"with regard to the opening or shutting of the gate "because a gate is only a part of a fence."

As Lord du Parcq said in *Searle* v. *Wallbank* (1): "An "underlying principle of the law of the highway is that all "those lawfully using the highway, or land adjacent to it, "must show mutual respect and forbearance. The motorist "must put up with the farmer's cattle: the farmer must "endure the motorist." The decision in that case was that, assuming there was no general duty to fence in cattle from the highway, there was no duty on the owner or occupier as between himself and users of the highway to take reasonable care to prevent any of his animals (not known to be dangerous) from straying on to the highway: see the opinion of Viscount Maugham (2).

As to the decision in *Deen* v. *Davies* (3) it can only be supported on the ground put forward by Lord Porter in *Searle* v. *Wallbank* (4): "A different view has, it is true "been held where animals have been brought on to the road "and have not been kept under such reasonable control as is "possible whilst they are there." Then Lord Porter cited a number of cases, one of which was *Deen* v. *Davies* (3). Apart from that ground, it is clear that the House of Lords would not have supported the decision in *Deen* v. *Davies* (3).

The editor of Salmond on the Law of Torts (10th ed.) at p. 563, writes that it is not clear what is to be regarded as the true ground of that decision, and that the true explanation of it lies in the fact that the immunity from the duty to fence is, in reality, a branch of the law relating to the duties of occupiers, and that the immunity does not extend to protect those who place their cattle on the land of others. It is doubtful if that is correct, and certainly no member of the Court of Appeal based his decision on that ground. Having regard to the evidence in this case, the observations of Greer L.J. in *Sycamore* v. *Ley* (5) and the judgment of Lord Atkin in *Fardon* v. *Harcourt-Rivington* (6) are not relevant.

Eric Mills for the plaintiff. It is true that there was no duty on the defendant to fence his cattle in on his farm, but on these facts there was a duty on him to use reasonable care that the calves should not rush out unexpectedly on to the highway. The trial judge was wrong in finding that the

(1) [1947] A. C. 341, 361.
(2) Ibid. 346, 351–3.
(3) [1935] 2 K. B. 282.
(4) [1947] A. C. 356.
(5) (1932) 147 L. T. 342, 345.
(6) (1932) 146 L. T. 391, 392.

transit on the highway had come to an end, and there was no evidence to support that finding. Beyond the fact that the calves had passed the gates opening on to the highway, there was, and, since the defendant did not choose to give evidence, there could be no evidence of where the calves were when they were frightened by the starting up of the engine of the motor lorry. What is clear is that they had not arrived at a place where they were tied up or enclosed. The highway transit had not ended, and *Deen* v. *Davies* (1) is an authority which concludes this case. The drive was only fifty feet long, and the lorry in the yard must have been within his view. The defendant should therefore have shut the gates leading into the drive or procured assistance earlier to drive the calves into the yard: see the evidence of the veterinary surgeon called for the plaintiff.

The defendant's duty in driving the calves on and off the highway had not terminated. Lord Greene M.R. said in *Hughes* v. *Williams* (2): "It is recognized in all the cases "relating to animals on a highway that there may be instances "where special circumstances impose a duty . . . . if the "owner or occupier of land adjoining a highway chooses to "put on to it an animal of such a nature or in such a condition "that he knows, or ought to know, that if it gets into the "road, it will run amok, he must take special care to "prevent it doing so." Greer L.J., said in *Sycamore* v. *Ley* (3) that a defendant might be liable for the conduct of a dog which had not been taken out of the category of tame animals if he put it in such a position and in such circumstances as rendered it likely that the dog would get excited, would lose its temper and would cause damage to people lawfully passing along the highway.

This was not a case of mere blundering obstruction by a cow on a highway as in *Ellis* v. *Banyard* (4): see the judgment of Vaughan Williams L.J., in that case. Goddard L.J., in *Hughes* v. *Williams* (5) said: "A different question may arise "if he drives animals on to the highway, because there he is "doing the deliberate act of taking an animal on to the highway "and it may be—I say no more than that—that thereby he "makes himself liable." In this case, once the calves had bolted back down the drive, the defendant pursued them, and pursued them on to the highway.

(1) [1935] 2 K. B. 282.
(2) [1943] K. B. 574, 576.
(3) 147 L. T. 342, 345.
(4) (1912) 106 L. T. 51.
(5) [1943] K. B. 574, 579.

Lord Atkin in *Fardon* v. *Harcourt-Rivington* (1) put forward the general principle applicable. He said (2): " Quite apart " from the liability imposed upon the owner of animals or " the person having control of them by reason of knowledge " of their propensities, there is the ordinary duty of a person " to take care either that his animal or his chattel is not put " to such a use as is likely to injure his neighbour—the ordinary " duty to take care in the cases put upon negligence." On that issue, see *Donoghue* v. *Stevenson* (3).

The rule laid down in *Searle* v. *Wallbank* (4) forms a limited exception to the general principle laid down in *Donoghue's* case (3). Romer L.J., in *Deen* v. *Davies* (5) said that in the cases the general principle was established that the owner of an animal which he brought on to the highway must use all reasonable care to prevent the animal's doing damage: see also *Turner* v. *Coates* (6) The plaintiff showed here a prima facie case which called for defence on the part of the defendant, who did not give evidence. The county court judge was justified in drawing the inference that the defendant, when he entered his drive behind the calves, knew of the presence of the motor lorry.

Berryman K.C., replied.

COHEN L.J. In view of the judge's conclusions I ought to refer to the pleadings in order to see what the issues were. The plaintiff alleged that " the defendant negligently drove " the said calves along and across a certain public highway " known as Audlem Road, Nantwich, in the county of Chester, " and into the drive of certain premises of the defendant " and out of the said drive on to the said highway." Then she pleads that she was " lawfully and properly riding her " bicycle along the said highway when the said calves, being " negligently driven and/or controlled by the defendant, " rushed from the drive of the defendant's property and " collided with the plaintiff knocking her from her bicycle." Particulars were asked of the negligence alleged, and on November 23, 1949, they were given under four headings:

" The defendant negligently drove two calves on to the " highway." That we can ignore, because it has been held that the defendant was perfectly properly in pursuit of his calves. 2. "The defendant failed to close the gate on his "property, thus permitting the calves to escape on to the "highway." 3. "The defendant failed so to control the "calves as to prevent them colliding with and injuring the "plaintiff"; and 4. "The defendant drove the said calves "on to the highway at an excessive speed, without warning "and without keeping a proper look out." That fourth particular I think can also be ignored.

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(1) 146 L. T. 391.
(2) Ibid. 392.
(3) [1932] A. C. 562.
(4) [1947] A. C. 341.
(5) [1935] 2 K. B. 282, 295.
(6) [1917] 1 K. B. 670.

The defendant submitted that the case was governed by *Searle* v. *Wallbank* (1). Mr. Smith, who then appeared for the plaintiff, submitted that it was covered by the decision in *Deen* v. *Davies* (2). I would observe that neither counsel appears then to have referred to *Turner* v. *Coates* (3), on which Mr. Mills now relies, or to the decision in *Fardon* v. *Harcourt-Rivington* (4), on which, or on cases there cited, I think the judge based his judgment.

The judge, after stating the facts as to the situation of the farmstead, mentioned that the gate was usually kept open, and continued: "The defendant knew that the lorry collecting "eggs was there and he knew that at any time it might be "started up." That is an important finding, and it is a finding vital to the decision of the case as the judge decided it. I shall have to revert to this point later on. He described the consequences of the lorry's starting up and the calves' rushing back on to the highway. Of the conduct of the defendant, he said: "The defendant behaved in a perfectly proper "manner in following the calves back down the drive and "in attempting to get in front of them." Then he found "that at the time of the accident the calves were not being "driven along the highway. The accident happened after "the calves had been driven off the highway, and after they "had been put on private property; it happened because the "calves escaped from private property on to the highway "owing to noise being created by the motor lorry being "started up." That, again, is an important finding because, if it is well founded in fact, it seems to me necessarily to follow that the plaintiff cannot rely on *Deen* v. *Davies* (2).

He states, and indeed it was evidenced by his very careful judgment, that he had looked not only at *Deen* v. *Davies* (2) and *Searle* v. *Wallbank* (1), to which his attention had been called, but at a large number of other cases. On the law,

(1) [1947] A. C. 341.
(2) [1935] 2 K. B. 282.
(3) [1917] 1 K. B. 670.
(4) 146 L. T. 391.

he said: "The relevant cases seem to fall into two classes: "cases in which an animal is being driven along the road "and, whilst being so driven, it injures someone on the road. "In this class of case the owner is liable if he fails to take all "reasonable precautions whilst the animal is being driven "along the road. I do not think that this class of case applies "to the case before me, because the owner was not driving "the calves along the road at the time of the accident; he "had already got them safely on to his private property "adjoining the road, and the accident happened because they "escaped from the private property. I think that there is "no question of the calves being driven along the highway "at the moment of the accident."

He went on: "Another class of case is where the animals "have been depastured on private property adjoining the "highway, and owing to the absence of a hedge or owing to "a defective hedge they escape on to the road, and cause "damage to persons on the road. The House of Lords have "held that in this class of case there is no liability, as there is "no duty on the occupier of land adjoining the highway to "fence his cattle in and prevent them getting on to the road: "see *Searle* v. *Wallbank* (1)."

He then stated the argument for the defendant, which was that the decision in *Searle* v. *Wallbank* (1) should conclude the matter, and continued: "He," that is Mr. Brabin, counsel for the defendant, "says that the putting of the calves into "the yard adjoining the highway is exactly the same thing "as putting them in a field adjoining the highway. I think "that I am disposed to accept this latter proposition, but I "think that when an animal is placed in a field, or for that "matter a yard, adjoining the highway, there may be special "circumstances in connexion with the field or the yard which "impose on an owner a special duty."

He then quoted *Sycamore* v. *Ley* (2), where Greer L.J., said that an owner may be liable for the conduct of a dog, "if he puts it in such a position and in such circumstances as "render it likely that the dog will get excited and will lose "its temper, and will cause damage to people lawfully passing "along the highway."

The judge proceeded (and this is the basis of his decision): "I think that in this case there were special circumstances "which imposed upon the defendant a duty to take special

(1) [1947] A. C. 341.

(2) 147 L. T. 342.

"care of the calves when he had driven them on to his private "property adjoining the highway. The defendant knew "that a calf, if startled, is likely to get wild and to run away; "he drove these calves into a place where he knew that there "was a motor lorry which was likely to be started up at any "moment, and that if the lorry were started up it would cause "noise, and that the noise would startle the calves and make "them run wild. In those circumstances I think that the "defendant ought not to have driven the calves into the yard "where the motor lorry was; or, if he did drive them into the "yard, he ought to have taken the precaution of closing the "gate to prevent their dashing on to the road if they were "startled by the starting of the engine, or he ought to have "had another man to assist him to control the calves. I find "that there were special circumstances here, which created "a special duty on the defendant; and that the defendant "failed to take the precautions which a careful and reasonable "man in the special circumstances would have taken."

I agree with the law as stated by the county court judge. I think his statement as to the second class of case, that is to say, where animals have been depastured on private property adjoining the highway, is clearly justified by the authorities. The rule was stated by Lord Greene M.R., in *Hughes* v. *Williams* (1), and the judgment of the Master of the Rolls left no doubt as to the rule's being in these terms: "There is no duty "on the owner or occupier of land adjoining the highway "to prevent animals on it from escaping on to the highway." I do not think that I need read the judgment in that case in any detail, but I should like to express my agreement with an observation of Goddard L.J. He said (2): "If he"—that is the owner—"is under no duty to fence, I have the greatest "difficulty—in spite of the views expressed obiter, as I think, "by Vaughan Williams L.J., in *Ellis* v. *Banyard* (3)—in seeing "how it could possibly be said that he is under a duty to keep "his gate shut. A different question may arise if he drives "animals on to the highway."

That the decision in *Hughes* v. *Williams* (4) correctly stated the law was made plain by the decision of the House of Lords in *Searle* v. *Wallbank* (5): see, for instance, the speech of Viscount Maugham, who said (6) that there were two possible questions which might arise, namely: "First, was the "respondent, as the owner of a field or fields abutting on the "highway, under a prima facie legal obligation to users of the "highway so to keep and maintain his hedges and gates (if "any) along the highway as to prevent his animals from stray-"ing on to it? Secondly, assuming there is no such general "duty, was he under a duty as between himself and users "of the highway to take reasonable care to prevent any of his "animals (not known to be dangerous) from straying on to the "highway?" Then, after a learned disquisition as to the position as regards the highway, Viscount Maugham answers this question as follows (1): "For these reasons I conclude "that the first question I have formulated above must be "answered in the negative; and I did not understand that "counsel for the appellant in his careful argument contended "to the contrary." He answered the second question also in favour of the defendant on the facts of that particular case.

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(1) [1943] K. B. 574, 575.
(2) Ibid. 579.
(3) 106 L. T. 51, 52.
(4) [1943] K. B. 574.
(5) [1947] A. C. 341.
(6) Ibid. 346.

I shall have to refer again to this speech later on in discussing the third point taken in the county court judge's judgment, but I will turn first to the other aspect of the case, namely, the highway cases. I will assume, for this purpose, that if the animal was on the highway there were circumstances which would justify a finding of negligence on the authority of *Deen* v. *Davies* (2). In that case the defendant had ridden a pony into Merthyr Tydfil, and on arriving at his destination left the pony at a stable. He did not tie the animal to the staple provided for the purpose, but to a wooden bar in the stall, which he believed to be firm. The wooden bar broke, the animal showed no vice, or anything of that kind, but trotted homeward, and in the course of her return knocked the plaintiff over. The county court judge gave judgment for the plaintiff, and assessed the damages at 150*l.*, and his decision was approved in this court.

At first sight it is difficult to see how it could be said that that animal was left on the highway or how the highway class of cases apply. The answer, I think, is to be found in the judgment of Romer L.J., when he said (3): "In the present "case the difficulty is to ascertain within which of those two "principles"—those are the two principles referred to by the judge—"the defendant in this case is brought. In my opinion "he is brought within the second principle. He had brought

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(1) [1947] A. C. 351.
(2) [1935] 2 K. B. 282.
(3) Ibid. 295.

"his horse upon the highway and he rode it into a town. "While he was riding it into the town he owed a duty to take "all reasonable care to prevent the horse doing damage to "other persons. If he had tethered it in the street he would "have owed a duty to take all reasonable care to see that the "horse was so securely tethered and tethered in such a place "that it could not do damage to other people. What he did, "as has been pointed out by Slesser L.J., was to put it into "a stable the door of which opened on the street, and was in "fact open at the time the horse eventually escaped from the "stable into the street; and the horse was tethered not to the "staple (which was apparently used by the owner of the "stable for tethering horses) but to a bit of wood which was "nailed—as the defendant thought securely—against the side "of the stable. In my opinion the defendant's duty had not "ceased when he so tethered his horse." On that basis the court held that the principles applicable to driving a horse along the highway applied and the plaintiff was entitled to succeed.

That that is the correct basis, and I think the only basis, on which *Deen* v. *Davies* (1) can be upheld, is supported by the observations of Lord Porter in *Searle* v. *Wallbank*, where he said (2): "A different view has it is true been held where "animals have been brought on to the road and have not been "kept under such reasonable control as is possible whilst they "are there. The recent cases of *Turner* v. *Coates* (3), *Gayler* "*& Pape Ld.* v. *B. Davies & Son Ld.* (4), and *Deen* v. *Davies* "(1), are, I think, to be included under this principle."

When does the duty end? Either it must be at the moment when the animal crosses, so to speak, the boundary between the highway and the defendant's own land, in which case, of course, it is plain in this case that the highway transit was over before the accident occurred, or it must be a question of degree and, therefore, of fact. If so, it seems to me that Mr. Berryman was quite right when he said that there is the plainest finding of fact by the county court judge that the calves had been driven off the highway at the material time and that the transit on the highway had ceased. I cannot see any ground on which it would be open to us to disturb this finding of fact by the county court judge.

That leaves me with the third point on which the judge

(1) [1936] 2 K. B. 282.
(2) [1947] A. C. 341, 356.
(3) [1917] 1 K. B. 670.
(4) [1924] 2 K. B. 75.

decided in the plaintiff's favour. That point was that there were special circumstances which might take the case out of the ordinary principle applied in *Searle* v. *Wallbank* (1). That there may be such cases appears from the judgment, for instance, of Lord Greene M.R., in *Hughes* v. *Williams* (2), when he said (3): " Similarly, I apprehend that, if the owner " or occupier of land adjoining a highway chooses to put on " to it an animal of such a nature or in such a condition that " he knows, or ought to know, that, if it gets into the road, it " will run amok, he must take special care to prevent it doing " so."

That such a case may exist is also shown by some of the observations in the speeches in *Searle* v. *Wallbank* (1). For instance, Lord du Parcq said (4): " Counsel for the appellant " submitted that, apart from any question of liability for " injury caused by an animal known to its owner to be " dangerous, an owner might be liable on the ground of " negligence if he could be shown to have failed in his duty to " take reasonable care. I agree that, subject to certain " reservations, this proposition may be accepted. In the case " of *Fardon* v. *Harcourt-Rivington* (5) in this House, Lord " Atkin used words which I would respectfully adopt. ' Quite " ' apart,' he said, ' from the liability imposed upon the owner " ' of animals or the person having control of them by reason " ' of knowledge of their propensities, there is the ordinary " ' duty of a person to take care either that his animal or his " ' chattel is not put to such a use as is likely to injure his " ' neighbour—the ordinary duty to take care in the cases " ' put upon negligence.' This is not a novel principle. As " early as 1676 an action on the case was brought successfully " against a defendant who had set about breaking in a horse " in Lincoln's Inn Fields, ' a place ' (as the pleader said) " ' much frequented by the King's subjects and unapt for such " ' purposes ': (*Mitchil* v. *Alestree* (6)). When, in *Cox* v. " *Burbidge* (7), Erle C.J., stated the question before the court " to be ' whether the owner of a horse is liable for a sudden " ' act of a fierce and violent nature which is altogether con- " ' trary to the usual habits of the horse, without more,' the " last two words of the sentence were not superfluous. They

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(1) [1947] A. C. 341.
(2) [1943] K. B. 574.
(3) Ibid. 576.
(4) [1947] A. C. 359.
(5) 146 L. T. 391, 392.
(6) (1677) 1 Vent. 295.
(7) (1863) 13 C. B. (N. S.) 430, 437.

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"allow for the possibility that there may be circumstances to "account for an animal's unusual misbehaviour of which the "defendant knew and against which it was his duty to guard. "Such circumstances were held to exist (to name only two "instances) in the recent case of *Deen* v. *Davies* (1) and *Aldham* "v. *United Dairies* (*London*) *Ld.* (2). Nevertheless, Lord "Atkin's proposition will be misunderstood if it is not read "as subject to two necessary qualifications: first, that where "no such special circumstances exist, negligence cannot be "established merely by proof that a defendant has failed "to provide against the possibility that a tame animal of mild "disposition will do some dangerous act contrary to its "ordinary nature, and, secondly, that even if a defendant's "omission to control or secure an animal is negligent, nothing "done by the animal which is contrary to its ordinary nature "can be regarded, in the absence of special circumstances, as "being directly caused by such negligence."

That is the principle which has been applied by the county court judge in reaching a decision in the plaintiff's favour. If I were able to agree with him that there was evidence on which he was justified in finding that special circumstances existed, I should repectfully agree with his conclusion. But the circumstances on which he based himself were that the defendant knew that there was a motor lorry in the yard, and that it was likely to be started up at any moment. I am unable to find that there was any evidence which justified that conclusion. It is not unimportant to bear in mind that no such issue was raised in the pleadings; nor was it raised, so far as one can tell, in the argument of counsel or solicitor on either side. The only possible foundation for it is that the defendant admitted—when I say "admitted" I mean in the sense that he did not go into the box to deny that he had said what the plaintiff attributed to him—that there was a lorry in the yard which started up when he was driving the calves in. On that the judge has drawn the inference that he knew it was there and knew that it was likely to start up.

I must say that I do not think, on those pleadings and on that evidence, that there is any justification for his conclusion. It is, of course, the practice of this court not readily to disturb the decision of a county court judge on the ground that there was no evidence on which he could reach his finding of fact. We recognize that, in the circumstances in which county court judges have to work, they cannot take a note of every word of the evidence or record every word of the argument. But when one looks at the pleadings in this case and the evidence together, it seems to me impossible to find that the defendant was fixed with knowledge that a lorry would be there at that time, and that it would be liable to start up. In those circumstances it seems to me there are no special circumstances.

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(1) [1935] 2 K. B. 282.

(2) [1940] 1 K. B. 507.

True, the suggestion was made, based, I think, on the expert evidence, that this was a case of animals inclined to run madly about, in the words of Lord Greene M.R. in *Hughes* v. *Williams* (1). Mr. Wilson did say that a calf runs away like a young horse, but he admitted that a calf is a tame animal. We are not dealing with a case of driving along a highway. I cannot think that the mere fact that a calf would be more readily startled into action by the starting up of a lorry justifies us in imputing to the farmer, who did not know beforehand of the presence of a lorry, such a duty as the plaintiff seeks to impose on him. Nor do I think that the county court judge would have decided in the plaintiff's favour had he not imputed to the defendant the knowledge of the presence of the egg lorry when he drove the calves into the drive. For these reasons I think it impossible, on the facts of this case, to find any special circumstances bringing into play the proposition laid down by Lord Atkin in *Fardon* v. *Harcourt-Rivington* (2). It seems to me that the case is exactly like the one contemplated by Lord du Parcq, when he said in *Searle* v. *Wallbank* (3): "Where no such "special circumstances exist, negligence cannot be established "merely by proof that a defendant has failed to provide "against the possibility that a tame animal of mild disposition "will do some dangerous act contrary to its ordinary nature." For these reasons, I would allow the appeal.

ASQUITH L.J. I agree, and would add nothing but for certain doubts expressed during the arguments by my brother Denning. Prima facie, *Searle* v. *Wallbank* (3) applies, and if it does apply the appeal must succeed. The plaintiff sought to exclude its application in two ways. First of all, it is clear that there can be special circumstances which displace the immunity of the occupier of land adjacent to a highway in

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(1) [1943] K. B. 574.
(2) 146 L. T. 391, 392.
(3) [1947] A. C. 341.

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respect of damage to persons on the highway by animals escaping from that land, special circumstances which impose a duty of care on him. The only special circumstance relied on by the plaintiff in this case was the supposed knowledge, which the county court judge has found to be actual knowledge, on the part of the defendant, when he drove these calves into the drive, first, that there was a motor lorry in the yard, and, secondly, that it was likely to start up. There is, however, no evidence, in my view, to support those findings, nor is it an inference which can be drawn from any of the proved facts. The second method by which the plaintiff seeks to oust the application of the *Searle* case (1) is by contending that on its facts this case falls within *Deen* v. *Davies* (2), a decision of this court affirmed within its limits by the House of Lords in *Searle's* case (1). There is, of course, a duty to control an animal which one is driving along the actual highway. In that case the court held that, while a horse driven along a highway to a town was stabled in a stable contiguous to that highway, the transit along the highway had not ended when the horse got into the stable, but was still notionally in progress.

It seems to me that the question whether a transit ended in a particular case must necessarily be a question of degree and therefore of fact. For instance, suppose that the drive in this case had been five miles long before it reached the farmyard: the judge would probably find the transit complete when the calves reached the yard. If this was a question of fact, there was a finding of fact that the transit was at an end, when the alleged negligence occurred. The trial judge has said : " I also find that at the time of the accident the calves " were not being driven along the highway. The accident " happened after the calves had been driven off the highway, " and after they had been put on private property ; it happened " because the calves escaped from private property on to the " highway owing to noise being created by the motor lorry " being started up." He said later : " I think that there " is no question of the calves being driven along the highway " at the moment of the accident."

That is the language used by the judge to whom *Deen* v. *Davies* (2) had been just cited. In those circumstances it seems to me that there was evidence to support the finding that the transit was over, and that no duty was owed on the

(1) [1947] A. C. 341.

(2) 1935] 2 K. B. 282.

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basis that it was still in progress. This being so, both of the special circumstances pleaded by the plaintiff fail him, and I think that the appeal ought to be allowed.

DENNING L.J. The plaintiff was riding her bicycle, quite carefully, along a road from Nantwich to Audlem. As she came opposite a gate leading to a farmyard, two calves rushed out, one of them knocked her off her bicycle, and she was injured. She brings this action against the farmer for damages. The calves had been in the field on the other side of the road, and the farmer had gone to fetch them by himself without the help of anyone else. He had driven them out of the field and along the public highway and into the drive leading towards the farmyard. As they were going along the drive, which is only fifty feet long, suddenly a motor lorry in the farmyard started up. The two calves were frightened and dashed back down the drive with the farmer following them. Hence the accident. The question is whether the plaintiff can recover.

The judge has found that the farmer was negligent. He said that the farmer ought to have closed the gates of the drive behind him. He said, alternatively, that the farmer ought to have had another man to assist him to control the calves. The farmer did not do either of these things, and was guilty of negligence. Some people may think that was rather a hard finding against the farmer, but, as I will show later, there was evidence which warranted the conclusion, and I myself do not think that on the facts the finding of negligence should be disturbed.

But what about the law? Was there any duty on the farmer to take care? For if there was none the finding of negligence, however well warranted by the facts, would not be warranted by law. There has been recently a case in the House of Lords, *Searle* v. *Wallbank* (1), which lays down that a farmer is under no duty to fence his land or to repair his fences, or to shut his gates. If in consequence a tame animal of mild disposition escapes on to the highway, a farmer is not liable for what may happen. The rule as to fencing, however, seems to me to be a special exception to the general duty of care which was laid down by the House of Lords in *Donoghue* v. *Stevenson* (2), and also stated by Lord Atkin in regard to animals in *Fardon* v. *Harcourt-Rivington* (3). There is a

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(1) [1947] A. C. 341.
(2) [1932] A. C. 562.
(3) 146 L. T. 391.

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general duty to use reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. If fencing is placed on one side, this general duty requires a farmer to use reasonable care to control his cattle when they are on or in the vicinity of a public highway, especially in these days when there are fast-moving cars and bicycles on the roads. It has been held that if a farmer drives animals along a highway he must use reasonable care to keep them under proper control. This applies especially to young animals like colts or calves, which are likely to become excited and rush madly about: see *Turner* v. *Coates* (1). The duty does not stop the moment they cross the edge of the highway, but continues when they go on to an adjoining verge or into an adjoining yard or through an open gate.

This court in the pony case —*Deen* v. *Davies* (2)—, held that the duty continued until the pony was safely tethered in a stable. It follows that if a farmer drives calves into a yard adjoining a highway—it may be the yard of a public house, or a railway station yard, or a market yard—it is his duty to use reasonable care until they are safely tied up, or the yard gate is shut. If that is right, then I cannot see that it makes any difference whether he is driving them into his own or another's yard. His duty to use reasonable care exists until he has driven them from the highway into a place of safety where they are not liable immediately to dash out again into the road.

In this case was the duty of care still continuing when the calves escaped? I think that it was: the calves had not been brought to safety. They were on a private road, it is true, but they were close to a motor lorry which was liable to start up at any moment, and there was nothing to stop their dashing into the public highway which was only fifty feet away. If the farmer had shut the gate, of course they would have been in safety, but he had not, so the duty of care still remained.

Then was the duty broken? The trial judge said that the farmer ought to have had another man to assist him to control the calves. There is ample evidence to support that view. The veterinary surgeon who was called by the plaintiff said: "If startled, a calf runs away just like a young horse; matured "animals are more sedate. If you are driving calves, you "should take added precautions. You need more men to

(1) [1917] 1 K. B. 670.

(2) [1935] 2 K. B. 282.

"drive them." Although this was only a short journey, it is obvious that it involved possible encounters with motor traffic and that, if the calves were startled, there were so many possible ways of escape that one man alone could not control them.

Suppose that the farmer had had just one other man with him: is it not quite likely that the accident might never have happened? If two men had stood in the way, these calves might not have come dashing back down the drive. It does not lie in the farmer's mouth to say that the added precaution would not have succeeded, because he did not go into the witness box to give any explanation of the accident at all. Surely he should have explained how it came to be that these calves dashed out of the drive. If he did know that the motor lorry was there and about to start up, he should have been on his guard and taken extra precautions. If he did not know it was there, why did he not? Ought he not to have anticipated motor traffic on this short journey and had another man with him?

In the absence of evidence by the farmer, surely the judge was entitled to draw an inference against him. The cyclist frankly gave all the evidence she could give. She could not speak as to the farmer's state of mind. If the one person who can speak as to the matter chooses not to give evidence about it, he should not be surprised if the court draws an inference adverse to him upon it. The courts have repeatedly done so, and I think that the judge was fully entitled to take that course here. He has found that the farmer was negligent and that that negligence caused the accident. In those circumstances, I should uphold the decision of the judge.

Appeal allowed.

Solicitors: *Lovell, Son & Pitfield for Walker, Smith & Way, Chester; Rider, Heaton, Meredith & Mills, for Bellyse & Eric Smith, Nantwich, Cheshire.*

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Tucker, Somervell and Denning L.JJ.

EDWARDS *v.* NEWLAND & CO; E. BURCHETT, LD., THIRD PARTY.

Bailment—Storage—Locatio custodiæ—Storage of furniture—A personal contract—No right to sub-contract without authority of bailor.

The defendants undertook to store furniture of the plaintiff, but, without his knowledge, sub-contracted with a third party to store the goods. The storage premises of the third party were bombed and rendered temporarily accessible to thieves, and the third party was unable to produce some pieces of the furniture to the defendants, who were therefore unable to produce them to the plaintiff.

Held, that the defendants, having undertaken to store the goods and not having done so, had no defence to the action—*per* Tucker and Somervell L.JJ. on the ground that a bailee for storage of the type known as "hire of custody," locatio custodiæ, had no authority to sub-contract for the storage and so to part with the possession of the goods; *per* Denning L.J. and *per* Somervell L.J., also, alternatively on the ground that, the contract of storage in question being one for the storage of furniture, the personal skill and care of the contractors was of the essence of the contract.

The defendants stored the furniture at the premises of the third party, whose premises were bombed in 1940. Thereupon the third party wrote to the defendants: "We regret to inform "you that our premises have been severely damaged by a bomb. "Your effects are so far intact, but, owing to the roof being "shattered, all goods stored are open to the elements, although "we are endeavouring to make it as waterproof as possible. Also: "one wall is badly fractured and liable to collapse. We should "strongly advise you to remove your goods as soon as possible." The furniture was left by the defendants on the premises.

Held, that the third party did not cease by reason of the letter to be responsible as bailee of the furniture.

Decision of Humphreys J., affirmed.

Appeal from Humphreys J.

In April, 1939, the defendants, Newland & Co., agreed with the plaintiff, Edwards, to store for him for reward certain furniture which was to be delivered up to the plaintiff, when required. The defendants contended that they did not agree to store these goods, but agreed with the plaintiff's wife that, as the plaintiff's agents, they would arrange for the storage of the furniture. This contention was negatived by the trial judge, who found that the contract between the plaintiff and the defendants was that the defendants should store the chattels, pointing to the terms of the letter of October, 1940, from the defendants to the

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plaintiff (infra). The defendants in fact, without the knowledge of the plaintiff, stored the plaintiff's furniture with the third party, E. Burchett, Ld.

On October 15, 1940, the premises of the third party, where the goods were stored, were bombed. On October 21, 1940, the third party wrote to the defendants: "We regret to inform you "that our premises have been severely damaged by a bomb. "Your effects are so far intact, but, owing to the roof being "shattered, all goods stored are open to the elements, although "we are endeavouring to make it as waterproof as possible. "Also, one wall is badly fractured and liable to collapse. We "should strongly advise you to remove your goods as soon as "possible."

The defendants then wrote to the plaintiff: "I regret to inform "you that the premises where your furniture is stored have been "severely damaged by a bomb. Your effects are so far intact, "but owing to the roof being shattered all goods stored are open "to the elements, although I am endeavouring to make it as "waterproof as possible. Also, one wall is badly fractured and "liable to collapse. I would strongly advise you to remove your "goods as soon as possible. Enclosed please find account to date "and a cheque in settlement will oblige." The plaintiff was on military service, and the plaintiff's wife sought to remove the goods, but she was refused access until the account of the defendant firm, outstanding, was paid. The plaintiff claimed from the defendants redelivery of the goods in 1945, and later brought an action against the defendants for the return of some of the goods or their value, claiming 321*l*. The defendants added the third party.

At the trial Humphreys J. gave judgment against the defendants for 84*l*., a number of the articles deposited not being forthcoming. He found that at the time the plaintiff had no knowledge that the defendants had not themselves stored the goods. He found that the defendants had undertaken to store the goods and that, not having themselves done so, they had no defence to the claim. His Lordship held, on the issue between the defendants and the third party, that there was a period when, through no fault of the third party, thefts of the plaintiff's property were possible; but the third party called evidence to show (and there was no cross-examination to the contrary) that they did all they could to look after its customers' goods in that period. Accordingly, Humphreys J. gave judgment also in favour of the third party against the defendants.

The defendants appealed against the judgment in favour of the plaintiff and also that in favour of the third party.

Sachs K.C. and *F. K. Glazebrook* for the defendants. There is no authority that a man who undertakes to store furniture must do so himself. It does not follow that because a contract is not assignable it cannot be vicariously performed. If X. undertakes to store goods he does not undertake himself to take charge of them and to take reasonable care of them: he undertakes that reasonable care will be taken of them by any person to whom he entrusts them: see the judgment of Cockburn C.J. in *British Waggon Co. and Parkgate Waggon Co.* v. *Lea & Co.* (1); of Lord Macnaghten in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ld.* (2); and of Lord Greene M.R. in *Davies* v. *Collins* (3).

[SOMERVELL L.J.:—MacKinnon L.J. there said (4):—"If "it was simply the case of a man bringing clothes to a dyer "and cleaner, asking to have them cleaned, and the shopman "acceding to his request, I think that would be work which "the shopman could carry out vicariously within the principle "laid down in the case of the *British Waggon Co.* v. *Lea* (1)." I find the statement surprising. Take the case where one sends clothes to be cleaned or dyed by a well-known firm, such as Pullars of Perth.]

Special circumstances may well make a difference, as, for instance, where a specially fine evening dress is sent to a firm with a special reputation for that kind of work.

[TUCKER L.J. Surely your proposition is contrary to the very terms of a bailment for safe custody by which the thing bailed must be returned to the bailor, on demand? Your clients exercised a lien on the goods when the plaintiff wished them to be returned in 1940.]

Counsel also addressed the court on the appeal of the defendants against the judgment in favour of the third party, on which the case is not reported except on the issue whether the third party were absolved from responsibility as bailees by the terms of their letter to the defendants dated October 21, 1940.

Ormerod for the plaintiff was not called on to argue.

Rees-Davies for the third party.

TUCKER L.J. I will ask SOMERVELL L.J. to deliver the first judgment.

(1) (1880) 5 Q. B. D. 149, 153.
(2) [1903] A. C. 414, 416.
(3) [1945] 1 All E. R. 247, 248.
(4) Ibid. 251.

SOMERVELL L.J. :—With regard to the claim of the plaintiff against the defendants, the trial judge found that the defendants had undertaken to store the goods and, not having themselves stored the goods, had no defence to the claim. With regard to that the judge said: "The defendant's answer to this claim is: 'I "'did nothing. I undertook to look after your goods, and what I "'did was to hand them over to somebody else whom you do not "'know, and said: "Will you look after these goods?" They "'may have a very good action against that person, if he has not "'looked after the goods; but, as far as they are concerned they "'have no answer to this claim, which is to the effect: 'You under-"'took to look after the goods. I cannot bring an action against "'the third person. I do not know who he is, except from what "'you tell me. I had no contract with him, therefore I cannot "'sue him. It is you that I sue, and if you have not looked after "'my goods and have in fact not returned them, then I claim "'damages.'" The judge said that that was good law and good sense, and there was really no dispute as to the facts on this issue. It was thus put to the head of the defendants' firm by Mr. Ormerod in the witness box. "At any rate, this much is true, is it not: "you never yourself looked after that furniture at all? (A) No. "(Q) You have no idea what happened to it? (A) I had no idea."

Mr Sachs challenged the judge's decision as being bad in law. He submitted that if A undertakes to store goods he is not himself undertaking to take charge of them and to take reasonable care of them; that what he is undertaking is that reasonable care will be taken of them by any person to whom he entrusts them. He referred to some cases (none of which, he agreed, concerned contracts of bailment) where the question was discussed whether the obligation taken on the face of the contract by the original party was an obligation which could be performed by a subcontractor or, in some of the cases, by an assignee. The first of those was *British Waggon Company and Parkgate Waggon Company* v. *Lea & Co.* (1). That case concerned repairs which were to be done to certain waggons, and the court decided that the repairs were such that the other party could not say that the contract was at an end, because the repairs, in the events which happened, were being done by someone other than the original contracting party. Cockburn C.J. said (2): "We entirely "concur in the principle on which the decision in *Robson* v. "*Drummond* (3) rests, namely, that where a person contracts

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(1) 5 Q. B. D. 149.
(2) Ibid. 153.
(3) (1831) 2 B. & Ad. 303.

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"with another to do work or perform service, and it can be "inferred that the person employed has been selected with reference to his individual skill, competency, or other personal "qualification, the inability or unwillingness of the party so "employed to execute the work or perform the service is a "sufficient answer to any demand by a stranger to the original "contract of the performance of it by the other party, and "entitles the latter to treat the contract as at an end, notwith-"standing that the person tendered to take the place of the "contracting party may be equally well qualified to do the ser-"vice. Personal performance is in such a case of the essence "of the contract, which, consequently, cannot in its absence be "enforced against an unwilling party."

That principle was considered in the next case to which we were referred, *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ld.* (1), where it was held also that the principle did not apply. At the end of his judgment Lord Lindley said (2): "In conclusion, I will only add that *British Waggon "Company, etc.* v. *Lea* (3) was, in my opinion, rightly decided, "and it is an authority very much in point for the associated "company."

We were referred to a more recent case in this court, that of *Davies* v. *Collins* (4), which concerned a contract for cleaning a uniform and doing certain small repairs. The decision turned in the main on the actual wording of a condition of the contract, which, of course, does not assist us here, but, in the course of it, Lord Greene, M.R., said (5): "Whether or not in any given "contract performance can properly be carried out by the "employment of a sub-contractor, must depend on the proper "inference to be drawn from the contract itself, the subject-"matter of it, and other material surrounding circumstances."

Mr. Sachs admitted that there was no case in which a bailee simpliciter, that is to say, where, as here, the contract was simply to store goods, had, when he had in fact entrusted the goods to someone else, been held entitled to retain the advantage of the limited liability which attaches to such bailees. In my opinion, Mr. Sachs' submission with regard to this fails on two grounds which, though related, may to some extent be said to be distinct. I think that it fails from the nature of this contract of bailment which we have to consider. A contract to store is a contract of

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(1) [1903] A. C. 414.

(2) Ibid. 425.

(3) 5 Q. B. D. 149.

(4) [1945] 1 All E. R. 247.

(5) Ibid. 250.

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bailment under which the bailor transfers possession to the bailee, and the bailee is undertaking, as it seems to me, to take possession of the goods and exercise reasonable care in looking after them on the principles which have been laid down in the cases. Therefore, a man who has undertaken to be a bailee for storage and who never in fact acts as such a bailee, but gets somebody else to take possession of the goods, seems to me to be in breach of his contract ab initio.

I think, myself, that it may also be said that the class of case with which we are dealing, namely, the storage of furniture, does come within the principle which I have read as stated in the *British Waggon Company* case (1), namely, that there is a type of contract in which the personal care of the other contracting party is the essence of the contract. Storage of furniture is a matter which can be done carefully or not so carefully. It is clearly a type of case in which a person may have a reputation for taking great care. Nor do I think it necessary in a case of this kind for the plaintiff to show that he relied on any special or any general reputation of the defendant. The defendants were recommended to the plaintiff's wife, and they were chosen and asked if they would store the furniture. They having undertaken to do that, that was a type of matter which they could not hand over to be performed by a sub-contractor. For those reasons, I think that the trial judge was right in holding that in the circumstances the defendants had no answer to this claim.

There is, I think, no dispute that this was a plain contract to store, because para. 3 of the defence, which follows on the paragraph in which the defendants allege that they acted merely as agent, states: " If, contrary to the defendant's contention, he " agreed as principal to store the plaintiff's goods." That is how the defendants put the alternative claim, and it seems to me that they did not store the plaintiff's goods. That disposes of that point. . . . .

His Lordship then discussed the appeal of the defendants against the judgment in favour of the third party. He said that before Humphreys J. it was clear that there was some argument whether as a result of the third party's writing to the defendants the letter dated October 21, 1940, the third party ceased to be responsible. That, if those words were given their legal import, was, he thought, wrong. In his view the third party clearly remained liable to take reasonable care in the circumstances. But, of course, having regard to the difficulties of obtaining staff and the other difficulties of war time, if premises were bombed, the goods might be imperilled either from thieves or the weather notwithstanding that the standard of reasonable care imposed by the law was complied with. The Lord Justice then upheld the finding of the trial judge that before the bombing of the premises of the third party in October, 1940, and after they had been repaired in 1941, it was practically impossible for anyone to have stolen the plaintiff's goods without the knowledge of the third party, and that, during the interval from 1940 to 1941, when, through no fault of the third party, thefts were possible, the third party did all that they could, their representatives having given evidence to that effect and not been cross-examined. Accordingly, the decision of the trial judge in favour of the third party against the defendants should be upheld.

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(1) 5 Q. B. D. 149, 153.

TUCKER L.J.: I agree. With regard to the first question, namely, the issue between the plaintiff and the defendants whether the latter, consistently with their contract with the plaintiff, could make a contract with the third party for the custody of these goods, I think it contrary to the very nature of a contract of bailment of the type known as "hire of custody" that the defendant, the so-called bailee, should be entitled to part with the possession of the goods. He received the goods prima facie as a bailee, and he can only deal with them in accordance with the authority, express or implied, conferred upon him by the bailor. I think that if in any particular case, authority, express or implied, is conferred on the bailee to part with the possession of the goods, the contract really ceases to be one purely of bailment: it becomes a complex contract under which the defendant may be under an obligation to the bailor so long as he has custody of the goods, and has other obligations placed upon him if and when, in accordance with the authority conferred by the bailor, he parts with the possession of the goods. Therefore, I think that in this case, there being evidence—though I think it was partly inferred—that there was a contract of bailment pure and simple, the moment it appeared that the defendants never had possession of the goods but merely arranged with someone else to fetch and store them, they had no answer to a claim after a lapse of time for the return of some of the goods which were not forthcoming. I think that is the view which the defendants themselves took of their duty and obligation, since it is clear from the correspondence that they were always at pains to give the impression to the plaintiff that they had charge of the goods themselves.

Furthermore, I think that there is very much to be said for the proposition that, even if Mr. Sachs is right with regard to the duty on the bailee, the defendants were in great difficulty as from October 22, 1940, when they were advised that these goods were in premises where the roof had been shattered and all the goods were open to the elements, and so forth, and were in great peril. It was no doubt wise of them to pass on the information to the plaintiff ; but I think that if they were entitled to part with the possession of the goods they were then under a duty to take active steps to preserve them. The head of the firm might perhaps have taken them to his own premises as a temporary measure. He gave no evidence to suggest that that was impossible. He might have made arrangements for the goods to be stored elsewhere. When that point was put to Mr. Sachs he did not really endeavour to controvert the position with regard to the defendants and the plaintiff, but, he said, if that were the position, then he could and would avail himself of the same argument against the third party.

I think that there may be a difference in the circumstances of this case between the positions of the defendants and the third party when the bombing occurred in October, 1940. The third party at once notified all their three hundred clients of what had happened, but I think it would be difficult to suggest that it was the duty of the third party there and then immediately to find accommodation for a very large quantity of goods for three hundred customers without even waiting for their consent. Their position has to be distinguished from that of the defendants, who were concerned with the goods of one customer which had become imperilled and as to which, so far as they were concerned, they gave no evidence that they had taken any steps to provide for their safety. However, in view of the facts, I agree that the position with regard to the duty of the bailee was that stated by Somervell L.J., so I do not think it necessary to express a final view.

[His Lordship gave reasons for deciding against the defendants in favour of the third party and concluded :] I agree that the appeal should be dismissed as against the plaintiff and the third party.

DENNING L.J. : The first question is whether a storage

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contractor is entitled to hand over the goods to another person under a sub-contract. There are many bailments in which the bailee is entitled to make a sub-bailment: the repairer of a motor-car, for instance, can often quite reasonably send away a part of it to another firm for repairs; a carrier of goods may need to entrust them to another carrier for part of the journey; a hirer may himself often, quite lawfully, sub-hire the goods. It all depends on the circumstances of the particular case. The contract here is a contract for the storage of furniture. In such a case, in my opinion, the personal skill and care of the contractor is of the essence of the contract. Much skill and care is necessary in appointing the men who are to handle the goods, in selecting the place where they are to be stored, in seeing that it is reasonably fire-proof and burglar-proof, and in choosing the caretakers. The owner of the goods is entitled in these respects to the personal care and skill of the contractor. If the contractor employs a sub-contractor, he does it at his own risk because, if the goods are lost whilst in the hands of the sub-contractor, the contractor cannot say that they would have been lost in any event. He, by breaking his contract, has prevented any evidence as to what would have happened if he had fulfilled it personally: see what Scrutton L.J. and also Bankes L.J. (1) said in *Coldman* v. *Hill* (2) when they referred to *Morison, Pollixfen and Blair* v. *Walton* (3) a case in the House of Lords. I agree, therefore, that, by handing over these goods to a sub-contractor, the head contractor broke his contract and is liable for the subsequent loss: see also *Lilley* v. *Doubleday* (4). [His Lordship agreed that the defendants' appeal failed also as against the third party].

Appeal as against plaintiff
and third party dismissed.

Solicitors: *B. P. Webster; Thomas Eggar & Son; Williams and Poole.*

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(1) [1919] 1 K. B. 443, 454.

(2) Ibid 447.

(3) House of Lords Printed Cases, 1909, quoted by Buckley L.J. in *Travers* (*Joseph*) *& Sons Ld.* v. *Cooper* [1915] 1 K. B. 73, 87–8.

(4) (1881) 7 Q. B. D. 510.

C. G. M.

1950
Apr. 20.

HALL
v.
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Lord Goddard C.J.
Morris and Finnemore JJ.

HALL *v.* ARNOLD AND OTHERS.

Friendly Society—Officer's refusal to deliver property—Complaint to court of summary jurisdiction—Case stated—Whether an appeal—Decision of justices "final and conclusive"—Jurisdiction of Divisional Court to entertain case stated—Summary Jurisdiction Act, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 2*—Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 33*—Friendly Societies Act,* 1896 (59 *&* 60 *Vict. c.* 25), *s.* 55, *sub-ss.* 1, 2.

By s. 55, sub-s. 2 of the Friendly Societies Act, 1896: "In "case of any neglect or refusal," among other things to pay over money as required by s. 55, sub-s. 1, "the . . . . authorized "officers of the society or branch . . . . may apply to the county "court or to a court of summary jurisdiction, and the order of "either such court shall be final and conclusive."

A friendly society was organized in districts or branches of which the sub-branches were called "tents." An information was preferred by trustees of a district against the secretary of one of its tents by way of complaint under s. 55, sub-s. 2 of the Act of 1896 that she had failed to comply with a notice under s. 55, sub-s. 1, requiring her to pay over certain money and property of the society in her hands. The secretary of the tent contended that the notice was invalid because not given by the society, its committee or trustees, or by the tent, its committee or trustees. The justices made the order sought, but on the application of the secretary, stated a case.

Held, that the case stated could not be entertained. The provision that the order of a court of summary jurisdiction should be final and conclusive, enacted as it was in an Act passed subsequently to the Summary Jurisdiction Act, 1879, especially when coupled with the provision that an order of the county court in like matters should be final and conclusive, precluded an appeal from a court of summary jurisdiction, and proceedings by way of case stated under s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879, read together, as they must be, constitute an appeal from a court of summary jurisdiction, and were therefore incompetent.

Westminster Corporation v. *Gordon Hotels Ld.* [1908] A. C., 142 applied.

CASE STATED by Surrey justices.

At a court of summary jurisdiction sitting at Sutton, an information was preferred by three persons, the trustees of the South London District No. 53 Branch of the Independent Order of Rechabites, Salford Unity Friendly Society, under

s. 55 of the Friendly Societies Act, 1896 (1) against Martha Ellis Hall. It was alleged that, on and since June 6, 1949, at Sutton, being the secretary of the "Good Shepherd" Tent No. 69 of the district in question, and being an officer of it having receipt or charge of money, she had refused to pay over all sums of money and deliver all property of the society in her hands or custody in compliance with a notice in writing dated June 3, 1949, contrary to s. 55 of the Friendly Societies Act, 1896.

On the hearing of the information the following facts were proved or admitted.

The society in question was at all material times a friendly society registered under the Act of 1896, and governed by general rules. The South London District No. 53 was a registered branch of the society. That district was at all material times governed by separate rules. The "Good "Shepherd" Tent, No. 69, was a branch of the society and of the district, and was governed by a third set of rules.

The prosecutors were the trustees of the district. The defendant was an officer of the tent and had money and property in her custody. On June 3, 1949, the written notice above referred to was served on the defendant at her usual place of residence, but she failed to comply with it.

On her behalf it was contended that the notice did not comply with s. 55, sub-s. 1 of the Act of 1896, in that it was not given by the society (or its committee or its trustees) or by the tent (or its committee or its trustees); that the information did not comply with s. 55, sub-s. 2, in that it was not preferred by the trustees or other authorized officers of the society or by the trustees or other authorized officers of the tent; and that therefore the justices had no jurisdiction to make the order applied for by the prosecutors.

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(1) Friendly Societies Act, 1896, s. 55, sub-s. 1: "Every officer of "a registered society or branch "having receipt or charge of "money shall, at such times as by "the rules of the society or branch "he should render account, or "upon demand made, or notice in "writing given or left at his last or "usual place of residence, give in "his account as may be required "by the society or branch, or by "the trustees or committee there-"of, to be examined and allowed "or disallowed by them, and shall, "on the like demand or notice, "pay over all sums of money and "deliver all property in his hands "or custody to such person as "the society or branch, or the "committee or the trustees, ap-"point."

Sub-section 2: "In case of any "neglect or refusal to deliver the "account, or to pay over the sums "of money or to deliver the pro-"perty in manner aforesaid, the "trustees or authorized officers "of the society or branch may sue "upon the bond or security before "mentioned, or may apply to the "county court or to a court of "summary jurisdiction, and the "order of either such court shall "be final and conclusive."

For the prosecuting trustees it was contended that s. 55, sub-ss. 1 and 2 of the Act of 1896, had been complied with, and that the justices had jurisdiction to make the order applied for.

The justices, being of opinion that s. 55, sub-ss. 1 and 2 had been complied with, held that they had jurisdiction to make the order sought. They accordingly made an order that the defendant should deliver up the property and money referred to in seven days, and pay *2l.* 9*s.* 6*d.* costs.

On the application of the defendant they stated this case for the opinion of the court.

Curtis-Raleigh for the prosecuting trustees. There is a preliminary objection to the competence of the court to entertain this appeal. The proceedings were taken under s. 55, sub-s. 2 of the Friendly Societies Act, 1896. The concluding words of the sub-section say that the order of a court of summary shall be final and conclusive, which words appeared also in the Friendly Societies Act, 1875, s. 20, sub-s. 2. The effect of that provision is that no appeal lies from the determination of the justices and therefore they have no power to state a case. (He referred to *First Edinburgh and Leith* 415*th Starr-Bowkett Building Society* v. *Munro* (1) and Stone's Justices Manuel (81st. ed.) p. 105.)

W. Gumbel for the defendant. The Friendly Societies Act, 1896, s. 55, sub-s. 2, re-enacts s. 20, sub-s. 2 of the Friendly Societies Act, 1875. Thus the same provision appears in the Act, subsequent to the passing of the Summary Jurisdiction Act, 1879, as appeared in the earlier Act of 1875. Section 33 of the Act of 1879 gives a right of appeal from a court of summary jurisdiction by special case, and that right should be taken to be preserved: the provision in the earlier Act of 1875 is abrogated by the general right given by s. 33 of the Act of 1879. The legislature, because it re-enacted the material provision of the Act of 1875 in identical terms in 1896, should not be presumed to have taken away the right given in 1879.

In *Reg.* v. *Bridge* (2), it was held that a magistrate was not

(1) (1883) 11 Rettie 5.

(2) (1890) 24 Q. B. D. 609.

entitled to refuse to state a case on a question of law concerning the construction of s. 129 of the Metropolis Management Act, 1855, notwithstanding the provision in that section that the decision of the justices should be final and conclusive. That case applies here, and not *Westminster Corporation* v. *Gordon Hotels Ld.* (1).

LORD GODDARD C.J. The defendant thought that she was aggrieved by the justice's order because, she maintained, the requirement that she should deliver up money and the documents had been made by the wrong people.

The structure of this friendly society is apparently one of districts and branches. What are called "tents" seem to be branches of the districts. The defendant maintained that, being an officer of a tent, she was only obliged to account for or deliver documents to the officers of the tent and not to the officers of the district. It is not a point in which there appears to be any particular merit, but we have not gone into that matter. The power of justices to state a case is given by s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879. On the question of stating a special case those two sections have always to be read together because the earlier section is still in force. There is no question but that the Act of 1857 treats a special case as an appeal. The word "appeal" is not used in the Act of 1879, but certainly, where justices state a case, the proceeding is always called an appeal by way of case stated; and that seems to be perfectly right according to the Act of 1857 which treats it as an appeal.

If this is an appeal, it would seem that there can be no means of bringing the case before this court, because the statute makes the decision of the court of summary jurisdiction final and conclusive. An option is given to the trustees here, for they can go to the county court. Where a county court judge makes an order, that can only be questioned by means of an appeal to the Court of Appeal. That, again, shows that this proceeding is an appeal against the decision of the justices, whereas the Act of 1896 says that the decision of the court of summary jurisdiction on these matters is to be final and conclusive.

Assistance in the matter is to be derived from *Westminster Corporation* v. *Gordon Hotels Ld.* (1). There proceedings had

(1) [1908] A. C. 142, 143.

been taken with regard to the disposal of trade refuse, under the Public Health (London) Act, 1891, which contained a similar provision that the decision of the court of summary jurisdiction should be final. The case was taken up to the House of Lords in an effort to have it decided that the special case having been stated, the courts had jurisdiction to entertain it. Lord Loreburn L.C., in a very short judgment affirming the decision of the Court of Appeal, said : " The Act of 1891 " declared that the decision of the magistrate should be final, " and I do not think that can be qualified by the earlier Act " of 1879 providing for the stating of a case. If the order of " the dates had been inverted, the matter might have borne " a different aspect."

In other words, if the Friendly Societies Act, 1896, had preceded the Summary Jurisdiction Acts, 1857 and 1879, it might have been different, because then it might have been said that the general words of the Act of 1879 overrode the limiting words in the earlier Act. It was argued for the defendant that, as the earlier Friendly Societies Act, 1875, contained these words and was then followed by the Summary Jurisdiction Acts, on the reasoning of Lord Loreburn L.C., and also of Cozens-Hardy M.R., in the Court of Appeal (1), it would follow that in 1879 an appeal was given by way of special case to a person in this position, overriding the words of the Friendly Societies Act of 1875. The Act of 1875 was, however, repealed by the Act of 1896, in which Parliament is found enacting by s. 55, sub-s. 2, that the decision of the justices shall be final and conclusive.

Accordingly we feel bound to give effect to the objection taken, and to hold that the justices have no power to state a special case in this matter—or, at any rate, that this court has no power to entertain a special case, which is, I think, clearly an appeal. As the decision of the justices is made final and conclusive by s. 55, sub-s. 2, we must hold that we have no jurisdiction to entertain the appeal, and it must be dismissed.

MORRIS J. I agree. It was alleged that there had been a neglect or refusal to deliver an account, or to pay over sums of money or to deliver property as required by s. 55, sub-s. 1, of the Friendly Societies Act, 1896. On the neglect or refusal to deliver, it was open to those who alleged it to apply either

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(1) [1907] 1 K. B. 910, 913, 914.

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to the county court or to a court of summary jurisdiction. In this case the prosecutors elected to apply to the court of summary jurisdiction, which made an order. It is provided by s. 55, sub-s. 2, that the order either of the county court or of the court of summary jurisdiction shall be final and conclusive. Those words are found in an Act passed in 1896, that is, after the passing of the Summary Jurisdiction Act, 1879. In my opinion they must be given their normal and full meaning, and the decision of the justices was accordingly final and conclusive. I therefore agree that it cannot be questioned in these proceedings.

FINNEMORE J. I agree.

Appeal dismissed.

Solicitors: *Wilkinson, Bowen, Haslip & Jackson; Chalton Hubbard & Co.*

L. F. J. McD.

1950
May 4.

Morris J.

BLUSTON & BRAMLEY, LD. *v.* LEIGH.

Company—Winding up—Execution—Sale of goods by sheriff—Notice of meeting to pass resolution for voluntary winding up—Resolution for compulsory winding up—Compulsory winding-up order—"As the "case may be"—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 325, *sub-s.* 1; *s.* 326, *sub-s.* 2.

By the Companies Act, 1948, s. 325, sub-s. 1: "Where a "creditor has issued execution against the goods . . . . of a "company . . . . and the company is subsequently wound up, "he shall not be entitled to retain the benefit of the execution ". . . . against the liquidator in the winding up of the company "unless he has completed the execution . . . . before the "commencement of the winding up: Provided that— . . . . (*c*) the "rights conferred by this subsection on the liquidator may be "set aside by the court in favour of the creditor to such extent "and subject to such terms as the court may think fit."

By s. 326, sub-s. 2: ". . . . where under an execution in "respect of a judgment . . . . the goods of a company are "sold . . . . the sheriff shall deduct the costs of the execution "from the proceeds of the sale . . . . and retain the balance "for fourteen days, and if within that time notice is served on him "of a petition for the winding up of the company having been "presented or of a meeting having been called at which there "is to be proposed a resolution for the voluntary winding up of "the company and an order is made or a resolution is passed, "as the case may be, for the winding up of the company, the "sheriff shall pay the balance to the liquidator, who shall be "entitled to retain it as against the execution creditor."

On July 16, 1948, a sheriff seized goods of a debtor company in execution to satisfy a judgment. On July 28 another company presented a petition for the winding up of the debtor company on the ground of its insolvency. On August 7 the sheriff sold by auction goods seized by him on July 16.

On August 19 a notice was served on the sheriff of a meeting of the creditors of the debtor company under the Companies Act, 1948, s. 293, to be held on September 17. The notice was accompanied by a letter to the sheriff's officer which stated that it was enclosed "in reference to s. 326, sub-s. 2, of the Companies "Act, 1948." On September 1 a notice of the petition which had been filed on July 28 was served on the sheriff. On September 17 there was a meeting of the members of the debtor company who passed a special resolution that it should be wound up in compulsory liquidation. On October 18 an order of the court was made for the compulsory winding up of the company on the petition of July 28. On January 4 the sheriff paid the proceeds of the sale of August 7 to the liquidator of the debtor company. The judgment creditors claimed that money from the sheriff.

Held, (1.) that the notice of August 19 was a sufficient *notice* of a meeting at which there was to be proposed a resolution for the voluntary winding up of the debtor company to satisfy s. 326, sub-s. 2, of the Act, but that the *resolution* which that sub-section required to be passed were it to apply was a resolution for the voluntary winding up of the company, and the resolution of September 17 was not such a resolution; that the effect of the words "as the case may be" was that the sub-section applied only if notice of a petition were followed by an order, or notice of a meeting were followed by a resolution for voluntary winding up; and that the sheriff was therefore not authorized by s. 326, sub-s. 2 to pay the liquidator, notwithstanding that the notice of August 19 was followed by an order for the winding up of the company; but (2.) that the sheriff was nevertheless entitled by s. 325, sub-s. 1 to pay him, since the effect of that sub-section was to divest the judgment creditors of their title to the money on October 18, the date of the winding-up order.

ACTION.

On July 9, 1948, Bluston & Bramley, Ld., obtained judgment against Fred J. Bailey (Furniture) Ld. for 215*l*. (including costs). On July 12 the judgment creditors issued a writ of fieri facias in respect of that judgment, and on July 16 the sheriff accordingly seized goods of the debtor company in execution. On

July 28 another company presented a petition for the winding up of the debtor company on the ground of its insolvency. On August 7 the sheriff sold by auction goods seized by him on July 16, the sale realizing some 500*l*.

On August 18 a letter was addressed to the sheriff's officer which began: " Dear Sir, Fred J. Bailey (Furniture) Limited: " In reference to s. 326, sub-s. 2, of the Companies Act, 1948, " we enclose notice of meeting of creditors of the above company under s. 293 of the said Act." The enclosure read: " Companies Act, 1948, creditors' voluntary winding up: " notice of first meeting of creditors—Fred J. Bailey (Furniture) Limited. Notice is hereby given pursuant to s. 293 of " the Companies Act, 1948, that a meeting of the creditors of the " above-named company will be held at the company's registered offices . . . . on September 17 . . . . for the purposes mentioned in ss. 294 and 295 of the said Act . . . ." The sheriff received that notice on August 19. On September 1 a notice of the petition which had been filed on July 28 was served on the sheriff.

On September 17 there was an extraordinary general meeting of the members of the debtor company and a meeting of creditors. The company passed a special resolution " that the " company cannot, by reason of its liabilities, continue its " business, and that it is advisable to wind up and that the " company be therefore wound up in compulsory liquidation; " and that the directors shall take every action possible to " expedite the hearing of the petition in compulsory liquidation " issued against the company and the appointment of a provisional liquidator therein."

On October 18 an order was made in the Chancery Division of the High Court for the compulsory winding up of the company on the petition of July 28. On January 4, 1949, the sheriff paid to the liquidator of the debtor company a sum of money including the 500*l*. realized by the sale of August 7.

The judgment creditors then bought the present action against the sheriff claiming from him 215*l*. (the amount of the judgment debt) as money had and received to their use.

The sheriff contended that he had acted properly in paying the money to the liquidator, but served third-party notices on the liquidator and the debtor company claiming that he was entitled to relief against them if he were held liable to the judgment creditors.

Aronson K.C., and *Panto* for the judgment creditors.

The sheriff was in breach of duty in paying the proceeds of sale of the goods in question to the liquidator of the debtor company.

Section 326, sub-s. 2, of the Companies Act, 1948, did not entitle the sheriff to pay that sum to the liquidator in the present case. The words " as the case may be " in that subsection make it clear that it can apply only (1.) where a notice of the presentation of a petition for the winding up of a company is followed by an order for its winding up or (2.) where notice of a meeting at which there is to be proposed a resolution for its winding up is followed by a resolution for its winding up. In the present case the winding up was by order of the court and no notice had been served on the sheriff within the statutory period of fourteen days from the sale of " a petition " for the winding up of the company having been presented." Condition (1.) was not therefore satisfied. Nor was condition (2.) satisfied, because (i.) the notice of August 19 was a notice only of a meeting of creditors, and not of the debtor company, and (ii.), in any event, there had been no resolution for its winding up. The structure of s. 326, sub-s. 2, of the Companies Act, 1948, is to be contrasted with that of s. 41, sub-s. 2, of the Bankruptcy Act, 1914, which provides for only one series of events. Section 326, sub-s. 2, provides for two distinct, exclusive, series of events.

As the sheriff cannot bring himself within s. 326, sub-s. 2, he is liable. Apart from that provision a right of action against the sheriff was vested in the judgment creditors by the sale for money had and received to their use ; see *Bower v. Hett* (1), *per* Lord Russell of Killowen C.J. It may be said that if the judgment creditors recover from the sheriff the liquidator can then bring an action under s. 325, sub-s. 1, against the judgment creditors for the sum recovered. But there is, at present, no lis between the judgment creditors and the liquidator. If there were they would rely on proviso (c.) to s. 325, sub-s. 1.

Boileau for the sheriff. The sheriff is entitled to rely on s. 326, sub-s. 2. The liquidation began on July 28, 1948, when the petition for the winding up of the debtor company was presented. The sale was on August 7. The sheriff was then bound by s. 326, sub-s. 2, to hold the proceeds of sale until August 21. The notice of August 19 then put him on his guard, and he was bound to continue holding the money to see what would happen.

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(1) [1895] 2 Q. B. 51, 56.

The notice of August 19 was in effect a notice "of a meeting "having been called at which there is to be proposed a resolu-"tion for the voluntary winding up of the company" within the meaning of s. 326, sub-s. 2. The sheriff, not being a shareholder of the debtor company could not get the notice of the meeting of the company; he could only get notice of the meeting of the creditors. He must be assumed to know the provisions of s. 293 of the Companies Act, 1948, from which it was clear that the meeting of creditors had only been summoned because there was to be a meeting of the company at which a resolution for voluntary winding up was to be proposed. The notice of August 19 therefore complied with s. 326, sub-s. 2. That sub-section requires the sheriff to have not *the* notice which calls the meeting of the company but *a* notice which gives him notice that such a meeting is to be held.

It does not matter whether that notice was followed by an order or a resolution for the winding up of the company. The phrase "as the case may be" in s. 326, sub-s. 2, does not mean "respectively." It means "whichever is appropriate in "the events which happen." The sub-section requires only notice of a petition *or* meeting and, at a later stage, an order made *or* resolution passed—whichever in fact happened.

But, even if that were not so, the notice of the meeting was, in the present case, followed by "a resolution for the winding "up of the company" within the meaning of s. 326, sub-s. 2, viz., the special resolution of September 17.

Pennycuick K.C. and *Sparrow* for the liquidator and debtor company, the defendants to the third-party proceedings by the sheriff, were then invited by the court to address it. As regards s. 326, sub-s. 2, we adopt the argument on behalf of the sheriff. But that sub-section does not apply to the present case; it is governed by s. 325, sub-s. 1.

In *In re Greer* (1) Chitty J., said of s. 11, sub-s. 2, of the Bankruptcy Act, 1890, which corresponds to s. 326, sub-s. 2, of the Companies Act, 1948: "By the enactment referred "to the sheriff is directed to retain the money for fourteen "days; and in the event of bankruptcy supervening the "execution creditor loses his right to the money. The effect "is to place a temporary embargo or stop on the money . . .

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(1) [1895] 2 Ch. 217, 221.

"the execution creditor's right to the money is vested, but "liable to be divested." So in the present case the right of the judgment creditors to the proceeds of the sale was vested but liable to be divested. It was divested by the order for compulsory winding up of October 18. The sheriff's implied promise to pay the judgment creditors was then dissolved by the operation of s. 325, sub-s. 1.

Aronson K.C. replied.

MORRIS J. [after stating the facts]. Much of the argument that has been addressed to the court has been directed to a consideration of the words of s. 326, sub-s. 2, of the Companies Act, 1948. Mr. Aronson on behalf of the judgment creditors submitted that that subsection had not been complied with; that the sheriff was not justified or authorized by it in paying the money to the liquidator; that there was notice neither of a petition for the winding up of the company nor of a meeting having been called at which there was to be proposed a resolution for the voluntary winding up of the company within the fourteen days mentioned in that provision; alternatively that, if there was a notice of such a meeting, that was not followed by a resolution for winding up, and that the words "and an order is made or a resolution is "passed, as the case may be" mean that, if a notice of a meeting has been served, then there must also follow a resolution at such a meeting. He submitted that it was not enough to satisfy the subsection that there was a notice of a meeting and that that was followed, not by a resolution at a meeting, but by an order for compulsory winding up. Therefore, Mr. Aronson submitted, the sheriff could not bring himself within s. 326, sub-s. 2, and, accordingly, he could not justify his action in handing the money over to the liquidator.

Reference was made to *Bower v. Hett* (1), in which Lord Russell of Killowen C.J. said: "In some cases the judges "have said that the moment the sheriff is paid the amount of "the judgment debt he becomes a debtor to the execution "creditor. For instance, in *Morland* v. *Pellatt* (2), Littledale J. "said in the course of the argument, 'When the sheriff received "'the money, he became liable to an action for money had and "'received by the plaintiff in that suit.' That is a statement "to the effect that when once the money was paid, a right of "action was vested in the judgment creditor." It was not contended either by Mr. Boileau or Mr. Pennycuick that that statement was other than an appropriate statement of the position. If, therefore, the sheriff was not right in handing over to the liquidator, then the form of action here adopted, namely, a claim for money had and received, does appear to be justified.

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(1) [1895] 2 Q. B. 51, 56. (2) (1828) 8 B. & C. 722, 723.

Mr. Boileau on behalf of the sheriff has taken three points He has submitted (1.) that there was, within the wording of s. 326, sub-s. 2, a notice of a meeting having been called at which there was to be proposed a resolution for the voluntary winding up of the company; (2.) that a resolution was passed; and (3.) that, whether a resolution was or was not passed, there was an order for compulsory winding up, and that the words "as "the case may be," to which I have already referred, meant no more than that if either an order was made or a resolution was passed the sub-section applied; in other words, that the phrase "as the case may be" merely meant "in the events "that happened."

Mr. Pennycuick, in making further submissions, adopted those of Mr. Boileau to which I have referred, but also addressed to the court a submission based on s. 325 of the Act. There having been an order for the compulsory winding up of the company on October 18, and the petition having been presented on July 28, the beginning of the winding up was July 28. The execution was not completed before July 28, and so it was submitted that under s. 325, sub-s. 1, the creditor was not entitled to retain the benefit of the execution as against the liquidator. Mr. Pennycuick submitted that on and after October 18, as the proceeds of execution were still in the hands of the sheriff, the sheriff was obliged by operation of law to account for them to the liquidator; that s. 325, sub-s. 1, had the effect that the right previously vested in the judgment creditors became divested; and that the sheriff owed a duty to account to the liquidator and only to the liquidator: the sheriff could not and ought not to pay the judgment creditors. Mr. Pennycuick referred to a note in Buckley on the Companies Acts (12th ed.) p. 665, which states: "The execution creditor's "right to the fruits of the execution is not contingent. It is "vested but liable to be divested by the liquidation," and the authority cited by the editor in support of that note is *In re Greer* (1). Mr. Pennycuick relied in particular on the following words from the judgment of Chitty J. (2): "The result of the

(1) [1895] 2 Ch. 217.

(2) Ibid. 221.

"authorities, apart from that enactment," (the Bankruptcy Act, 1890, s. 11, sub-s. 2) "is that the sheriff holds the money "to the use of the judgment creditor, and is liable to be sued "in an action for money had and received. For that proposition "it is sufficient to cite the case of *Morland* v. *Pellatt* (1). By "the enactment referred to the sheriff is directed to retain the "money for fourteen days; and in the event of bankruptcy "supervening, the execution creditor loses his right to the "money. The effect is to place a temporary embargo or stop "on the money. If more technical language is requisite, I "say the execution creditor's right to the money is vested, but "liable to be divested. His right to the money is not a con-"tingent right. In this case no bankruptcy supervened. The "previous bankruptcy of the execution creditor Fanshawe "had been anulled."

If one of Mr. Boileau's arguments which Mr. Pennycuick adopted was correct, s. 326, sub-s. 2, applied; but, if it did not, Mr. Pennycuick conceded that between August 21, the date when the statutory fourteen days expired, and October 18, when the compulsory winding up order was made, the sheriff would have been obliged to account to and pay the money over to the judgment creditors. But Mr. Pennycuick submitted that after October 18 the right that the judgment creditors had, in the events which we are considering, then vested in them, divested, and that the sheriff thereafter was obliged to pay the money to the liquidator.

In regard to this part of the case Mr. Aronson's submission was that s. 325, sub-s. 1, was not concerned with the sheriff: it was the next section which provided for the position of the sheriff, and s. 325, sub-s. 1, was saying that the creditor should not be entitled to *retain* the benefit of the execution. Mr. Aronson submitted that, unless s. 326, sub-s. 2, were operative, the position was that the sheriff should now account, or should be liable in this action to account, to the judgment creditors: s. 325, sub-s. 1, would then apply, and the judgment creditors would not prima facie be entitled to retain the benefit, but Mr. Aronson submitted, proviso (c) would be operative, and it would be open to the judgment creditors to seek to set aside in favour of the judgment creditors the rights conferred on the liquidator to such extent and subject to such terms as the court might think fit.

In my judgment the effect of s. 325, sub-s. 1, is to negative the title of the judgment creditors to this money. The result, in my judgment, is that by operation of the Act of Parliament statutory provisions are superimposed on the duties laid on the sheriff by the writ of fieri facias which was directed to him. Assuming for this part of the case that s. 326, sub-s. 2, does not apply, the title of the judgment creditors went on October 18 by operation of law, and I have come to the conclusion that Mr. Pennycuick's submission on this part of the case must prevail. The result is that there was a divesting from the judgment creditors of such rights, if any, as were vested in them on October 18; and s. 325, sub-s. 1, provides that they shall not be entitled to retain the benefit of the execution. If the position was that on October 18 they had a vested right to claim from the sheriff the benefit of the execution, that right ceased by operation of the statutory provision in s. 325, sub-s. 1. Stated otherwise, the title of the judgment creditors has been negatived by Act of Parliament, namely by the operation of this sub-section. It follows from that, in my judgment, that the sheriff was entitled to do what he did, namely to hand over the money to the liquidator.

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(1) 8 B. & C. 722, 723.

As I have formed that view, it would be sufficient if I did not consider the other part of the case, namely the arguments presented by Mr. Boileau, but I think it only fair that I should state my views on the three points that he has submitted. The first point is whether there was a notice to the sheriff within the statutory fourteen days of a meeting having been called at which there was to be proposed a resolution for the voluntary winding up of the company. The letter of August 18 enclosing the notice of the meeting of creditors began by making reference to s. 326, sub-s. 2, and three other sections of the Act, s.s. 293, 294 and 295, were referred to in that letter or in the notice. Section 293, sub-s. 1, of the Act provides: "The company shall cause a meeting of the creditors of the "company to be summoned for the day, or the day next follow-"ing the day, on which there is to be held the meeting at which "the resolution for voluntary winding up is to be proposed, "and shall cause the notices of the said meeting of creditors "to be sent by post to the creditors simultaneously with the "sending of the notices of the said meeting of the company."

In my judgment, the result of the sheriff having that letter and that notice was that there was notice served on him of a meeting having been called at which there was to be proposed a resolution for the voluntary winding up of the company.

The actual notice served, together with the letter, contained a sufficient notice, in my judgment, of the fact that a meeting had been convened at which there was to be proposed a resolution for the voluntary winding up of the company. That was the first point. Mr. Boileau did not contend that there was ever notice served on the sheriff of the presentation of a petition; there had, of course, been a petition on July 28, but no notice of that was given to the sheriff within the statutory fourteen days. I therefore think that Mr. Boileau's first submission is correct.

His next submission was that a resolution was passed within the wording of the later part of sub-s. 2 of s. 326, namely the words, "and an order is made or a resolution is passed, "as the case may be, for the winding up of the company," It seems to me that that must mean a resolution for the voluntary winding up of the company. Mr. Boileau referred to s. 278, sub-s. 1, which provides: "A company may be wound "up voluntarily . . . . (*c*) if the company resolves by extra-"ordinary resolution to the effect that it cannot by reason of "its liabilities continue its business, and that it is advisable to "wind up." In my judgment it cannot be said that the resolution which was passed was a resolution for the voluntary winding up of the company, and I do not consider that Mr. Boileau's second submission is correct.

The third point made by Mr. Boileau, which would be sufficient for him as he is in my view right on the first point, although he is wrong on the second point, is that the phrase "as the case may be" merely means "in the events which happened." The construction of these words is, in my judgment, by no means easy, but I must endeavour to give a reasonable and fair meaning to the words in their context, irrespective of what might be the result, and I have come to the conclusion that Mr. Boileau's argument on this third point, very attractive though it was, does not prevail. It seems to me that no meaning is given to the words "as the case may be" if his submission is correct. The result in this case, so far as that point is concerned, may be a little strange. There was in fact a petition, and it was the petition which was the precursor of what later happened, namely the making of a compulsory winding-up order. It would therefore seem as though the spirit of s. 326, sub.-s. 2 was fulfilled, since there was notice of a meeting and afterwards an order for compulsory liquidation was made; but with some reluctance I have come to the

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Morris J.

conclusion that I have expressed, that is to say, that the words "as the case may be" in this sub-section do not have the meaning ascribed to them by Mr. Boileau and that the sub-section contemplates that, where there has been a notice of a petition, it should be followed by an order, and that where there has been notice of a meeting it should be followed by a resolution for voluntary winding up.

It would appear to be somewhat against the desired effect for which the sub-section was possibly providing that this result follows, particularly when one has in mind some of the observations made in the Court of Appeal in *Latter* v. *Juckes and Page* (1) by Lord Hanworth, M.R., and by Scrutton L.J.; but these words "as the case may be" are words in a statute which I must construe, and I have felt obliged to give them the meaning that I have stated.

For these reasons I am against Mr. Boileau on the third of his submissions; but, for the reasons earlier stated, in my judgment the sheriff rightly paid the money to the liquidator, and for that reason this action fails.

Judgment for the sheriff.

Solicitors: *Ronald Fletcher & Co.; Field, Roscoe & Co. for Freer, Bouskell & Co., Leicester; Lucien Fior.*

(1) [1927] 1 K. B. 17, 29, 31.

R. P. C.

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May 3.

Lord Goddard C.J., Humphreys, Byrne, Morris and Finnemore JJ.

REX *v.* NORFOLK JUSTICES AND ANOTHER
Ex parte DIRECTOR OF PUBLIC PROSECUTIONS.

Criminal law—Procedure—Conviction by justices—Committal of prisoner to quarter sessions—Committal nullity because not within justices' powers—Whether "judgment" given—Quarter sessions' refusal to sentence prisoner—Power of petty sessions to compel attendance for sentence—Mandamus—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 28, *sub-ss.* 1 *and* 2, *and s.* 29, *sub-s.* 1.

Where justices, acting under s. 29, sub-s. 1 of the Criminal Justice Act, 1948, commit a prisoner to quarter sessions for sentence after convicting him, they have not passed judgment on him, but have committed him instead of doing so, for the case is not finally disposed of until quarter sessions have passed sentence.

Where, therefore, justices, having convicted a defendant, purported to commit him to quarter sessions for sentence in pursuance of their powers under s. 29, sub-s. 1, but the case was not one to which the sub-section applied, so that the committal was a nullity and quarter sessions consequently refused to sentence the defendant, and the justices at petty sessions refused to proceed with the matter on the ground that they were in their opinion functi officio,

Held, that no judgment had been passed on the defendant at petty sessions; that the case remained undisposed of by the justices, who were accordingly not functi officio; that an order of mandamus should issue directing them to hear and determine the case by imposing sentence; and that the justices, in order to secure the defendant's reappearance before them, did not need to, and should not, issue a fresh summons on the original information, but had merely to notify him that his attendance for sentence was required.

APPLICATION for an order of mandamus.

One Leonard Pocock appeared before Norfolk justices sitting at South Greenhoe on summonses alleging seven offences under the Bankruptcy Act, 1914, of obtaining credit without disclosing that he was an undischarged bankrupt. He elected to be tried summarily. The justices on December 5, 1949, convicted him on six of the seven charges, whereupon he asked for seven other offences to be taken into consideration. The case was clearly an inappropriate one to be tried summarily. When the justices heard of the seven other offences they realized that the case was more serious than they had appreciated, and they announced that they would commit the defendant for sentence to quarter sessions under s. 29 of the Criminal Justice Act, 1948 (1). They thereupon

(1) Criminal Justice Act, 1948, s. 28, sub-s. 1: "Subject to the "provisions of this section, where "a person who is not less than "fourteen years of age is charged "before a court of summary "jurisdiction with an offence "which, by virtue of any enactment, is punishable either on "summary conviction or on conviction on indictment, then if "application in that behalf is "made by the prosecutor before "the charge has been entered "upon, the court may then determine to try the case summarily; "but if the court does not so "determine it shall proceed to "hear the case as if the offence "were punishable on conviction on "indictment only."

Sub-section 2: "Where the "court has begun, in accordance "with the last foregoing sub-section, to hear a case as if the "offence were punishable on conviction on indictment only, then "if at any time during the hearing "it appears to the court, having "regard to any representations "made in the presence of the "accused by or on behalf of the

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admitted him to bail to appear before quarter sessions for sentence in due course.

When the defendant appeared before quarter sessions counsel for the Director of Public Prosecutions, submitted that the order of committal was a nullity, and that consequently quarter sessions had no power to deal with the case in any way. Quarter sessions held (1.) that, as under s. 29 of the Act of 1948 the procedure of committal to them after conviction by a court of summary jurisdiction was only available in the case of indictable offences tried summarily under s. 24 of the Criminal Justice Act, 1925, or under s. 28, sub-s. 2 of the Act of 1948, and as the offences in question did not come within any of those provisions, they were incapable of being the subject of committal to quarter sessions for sentence and the committal was a nullity; and (2.) that where the justices had such power to commit a case to quarter sessions they must commit in custody, not on bail. Quarter sessions accordingly, taking the view that the position reverted to what it had been before the committal order was made, made no order except to discharge bail.

The question then arose how to get the defendant back before the justices. The Director of Public Prosecutions decided to issue summonses for the same offences as were alleged in the original summonses and calling on the defendant to appear to be sentenced for the offences of which he had been convicted. The summonses were returnable on February 27, on which date the same justices sat again. On the representations of the defendant's solicitor they refused to proceed with the matter.

The Director of Public Prosecutions accordingly now

"prosecutor, or made by or on "behalf of the accused, and to "the nature of the case, that it is "proper to do so, the court may "then determine . . . . to try "the case summarily."

Section 29, sub-s. 1: "Where "under s. 28, sub-s. 2, of this "Act or s. 24 of the Criminal "Justice Act, 1925, a person who "is not less than seventeen years "of age is tried summarily by a "court of summary jurisdiction "for an indictable offence, and is "convicted by that court of that "offence, then if, on obtaining "information as to his character "and antecedents, the court is of "opinion that they are such that "greater punishment should be "inflicted in respect of the offence "than that court has power to "inflict, the court may, in lieu "of dealing with him in any "manner in which the court has "power to deal with him, commit "him in custody to quarter "sessions for sentence in accordance with the following pro- "visions of this section."

applied for an order of mandamus directing the justices at petty sessions to hear and determine according to law the charges against the defendant, or alternatively to direct the justices to impose a sentence upon him in respect of the offences of which they had convicted him.

Sir Hartley Shawcross, A.-G., and *Harold Brown* for the Director of Public Prosecutions. This application raises three questions: (I.) If the committal of a prisoner to quarter sessions for sentence under s. 29 of the Criminal Justice Act, 1948, is a nullity, have the committing justices power themselves to deal with the prisoner on his again appearing before them, or are they functi officio with regard to the matter? (2.) If they have that power once the prisoner again appears before them, have they power to issue a fresh summons to him so to appear for sentence on its emerging that their order committing him to quarter sessions for sentence was a nullity? (3.) If such a fresh summons be issued, can the plea of autrefois convict be raised?

The facts of this case are merely a peg on which to hang an important matter of principle.

Both sides acquiesced in the course of admitting the defendant to appear before quarter sessions for sentence, but it was wrong for two reasons: (I.) by s. 29, sub-s. I of the Act of 1948 the procedure of committal to quarter sessions after conviction by a court of summary jurisdiction is only available in the case of indictable offences tried summarily under s. 24 of and sch. II to the Criminal Justice Act, 1925, or to cases under s. 28, sub-s. 2 of the Act of 1948, that is to say, cases where the justices, under s. 28, sub-s. I, have begun to hear the case as if it were punishable on conviction on indictment only. In the present case that never happened: the justices, having determined to try the case summarily, did so and convicted the defendant of the summary offence. That, therefore, was not a matter to which s. 29, sub-s. I applied, and so was incapable of being the subject of a committal to quarter sessions for sentence. Secondly, if justices did commit for sentence to quarter sessions, they must commit in custody, and not on bail. Had they taken the former course, difficulties of a different kind would perhaps have arisen.

With regard to the first of the three points raised by the case, by s. 29, sub-s. I of the Criminal Justice Act, 1948, the justices have power, instead of passing sentence, to commit a defendant to quarter sessions for sentence. The point to note is that their power of committal to quarter sessions for sentence is exercisable " in lieu of " their duty to pass sentence themselves. The committal having failed here because it was a nullity, the justices had not done their duty and therefore could not be functi officio. They had failed to do anything in place of their unfulfilled duty to pass sentence: see *Bannister* v. *Clarke* (1).

As appears from Oke's Magisterial Synopsis (14th ed.) p. 84, adjudication is the most important part of a conviction. Justices must make an order. They cannot simply say to a man " you are convicted." Their order must either be an order of discharge, absolute or conditional, or a probation order, or a sentence. If justices simply convicted and did no more, this court would immediately intervene by means of mandamus.

[LORD GODDARD C.J. The statute does not say how a defendant is to be brought back before the justices in a case like this.]

That leads to the second point. Where justices release a man on probation and the Divisional Court says that that course should not have been taken, there is no statutory indication how the defendant is to be brought back before the justices; but it is submitted that the court has an inherent power to that end derived from the common law. Rule 164 of the Crown Office Rules would seem to meet this point. In Short and Mellor on the Practice of the Crown Office (2nd ed.) p. 547, form No. 107, " Warrant after conviction " to hold defendant to bail to appear for sentence " is set out. That warrant has a statutory basis, but it derives from the old practice of the Court of King's Bench. There is an inherent jurisdiction to bring the defendant here before this court; and an analogous jurisdiction, it is submitted, exists in the court of summary jurisdiction.

[LORD GODDARD C.J. If there is a duty on the court of summary jurisdiction to sentence the defendant, then it must have power to have him brought before it.]

It is submitted that there is an inherent jurisdiction to that end in the court of summary jurisdiction just as there is in the Divisional Court.

[Counsel referred to Hands' Crown Practice (1803) p. 419,

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(1) [1920] 3 K. B. 598.

Corner's Crown Practice (1844) p. 152, *Reg.* v. *Haden Corser* (1) and s. 1 of the Summary Jurisdiction Act, 1948.]

Next, it is submitted that no plea of autrefois convict could be raised here. The plea can only be raised where a person is called on to plead. If the defendant had been called on to plead to the original information, then he could have pleaded autrefois convict. He cannot resist on the ground of autrefois convict a summons to appear for sentence on his existing conviction.

[HUMPHRIES J. Autrefois convict has nothing to do with this case. The defendant was not being summoned to stand trial again.]

It is submitted that this is clearly a case for mandamus to be issued to the justices. They have refused to complete their adjudication.

[LORD GODDARD C.J. An order of mandamus from this court may be welcome to the justices as protecting them.]

Christmas Humphreys for the justices. The justices do not wish to take any technical point here. They only wish to assist the court to elucidate their powers. They have, not unreasonably, taken the course of "safety first," being unwilling to arrogate to themselves powers which are a matter of such doubt as to require a bench of five judges to resolve them.

The expression "hear and determine" means to try a case as distinct from adjourning it or passing sentence. The answer of the justices, therefore, to the application that they should be directed to hear and determine the case against the defendant is that they have done so, and convicted him. If the court thinks that they have power to issue another summons to the defendant, or to send the police to arrest him, they will obey the court's order to that effect.

Widgery for the defendant. When the justices had the defendant before them on the first occasion they convicted him. They proceeded to judgment and exhausted their powers in respect of alteration of that judgment at a later date. Once a final judgment had been pronounced any alteration in it was a matter for appeal. There could be no amendment of it by the justices who tried the issue in the first place. Authority is surely unnecessary for that proposition. It is submitted that there was here such a judgment as precludes the justices from making any alteration in it at a later stage.

(1) (1892) 8 T. L. R. 563.

Where there is a valid conviction by a competent court and that court makes a mistake in the disposal of the prisoner, even if it makes a disposal which is right outside its jurisdiction, there is no power in that court to alter its own error in regard to sentence.

The duty of the justices in this matter is set out in s. 14 of the Summary Jurisdiction Act, 1848: they "shall convict "or make an order upon the defendant, or dismiss the informa-"tion . . . . as the case may be." That is all that they may do: they are given no opportunity of themselves correcting their error. [*Rex* v. *Bourne* (1) cited.] The justices have not failed to adjudicate. Their order on the defendant was not a nullity merely because their order for his further disposal was a nullity. In *Bannister* v. *Clarke* (2) there had been no judgment at all. To constitute a judgment for these purposes, three things are required: (1.) the defendant must be tried in a court of competent jurisdiction; (2.) there must be a regular trial, as opposed to a mistrial due to irregularity: see *Rex* v. *Marsham* (3) referred to in *Bannister* v. *Clarke* (2); (3.) there must be conviction or acquittal. Thereafter the justices must make their decision as to the disposal of the prisoner. They did that here: they considered that their powers were insufficient for dealing with this defendant. They decided that he should not receive any such sentence as they were entitled by law to impose. They came to a wrong decision as to his disposal. It would be allowing them to amend their own judgment if they were now directed to produce a different order for the disposal of the defendant.

[LORD GODDARD C.J. So you say that the order sending the defendant to quarter sessions is a judgment?]

The justices have delivered judgment and then proceeded to apply their minds to the question of disposal. The actual conviction here was good, and that concludes the matter. The fact that the justices have misinterpreted their powers as to sentence does not invalidate that conviction.

Sir Hartley Shawcross A.-G., in reply. There is no judgment unless the matter between the parties is finally disposed of. If the court simply takes a procedural step by way of transferring the defendant from one court to another, and if the step taken proves to be a nullity, that leaves the court in the position in which it would have been before it purported to make the invalid transfer.

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(1) (1837) 7 Ad. & El. 58.

(2) [1920] 3 K. B. 598.

(3) [1912] 2 K. B. 362.

Judgment ordinarily means, in this connexion, the sentence of the court in the matter on the record. Section 29, sub-s. 1 of the Act of 1948 expressly empowers the justices instead of giving a judgment to take a certain course. If the justices exercise that power the defendant has to wait until that course has been taken before he can appeal. A matter has not been heard and determined unless there has been an adjudication which finally disposes of the matter on the record between the parties.

The justices have power under s. 1 of the Summary Jurisdiction Act, 1848, to issue a summons to the defendant to reappear before them. There may be a succession of summonses on the same information unless there has been a determination on the merits. If that be right, there is no reason why there should not be a fresh summons or further summonses until determination; there has been no judgment yet, therefore the fresh summonses issued here cannot be said to result in the defendant's being put in peril twice.

LORD GODDARD C.J. It will be convenient first to state the various offences in respect of which justices sitting in petty sessions have power to adjudicate—I leave out of account their sitting as examining justices for cases triable only on indictment. First there are cases made summary offences only by statute. In those there is no question but that the justices must adjudicate themselves, and no other court has power to adjudicate upon them. Secondly, there are offences which by statute can be tried either summarily or on indictment. Thirdly, there are the cases generally referred to as coming under s. 17 of the Summary Jurisdiction Act, 1879. They are prima facie summary cases, but that section provides that, where the sentence which may be imposed exceeds three months, the defendant has the right to claim to be tried by jury. Fourth, and most important, are the indictable cases which are set out in sch. II to the Criminal Justice Act, 1925, which, if the defendant consents and the justices and the prosecution raise no objection, or if, the prosecution raising objection, the justices so determine, can be dealt with summarily.

It was in respect of offences of the fourth class that difficulties arose in courts of summary jurisdiction. Before the Criminal

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Justice Act, 1948, the matter came before this court in *Rex* v. *Sheridan* (1) and *Rex* v. *Grant* (2), where the justices had agreed to deal with indictable cases summarily. The justices in *Rex* v. *Sheridan* (1), having decided to convict and announced their intention of doing so, heard evidence as to the character of the defendant and came to the conclusion that he ought to receive a more severe sentence than they had power to give. Thereupon they committed him to quarter sessions for trial. When he appeared before quarter sessions, objection was taken that he had been already convicted, and he entered a plea of autrefois convict. It was held by this court that that plea was a good plea in bar: he had already been convicted, and quarter sessions therefore had no power to try him over again. That case was followed in *Rex* v. *Grant* (2).

Section 28, sub-s. 2 of the Act of 1948 was passed in respect of indictable cases which may be dealt with summarily with the consent of the accused person. Section 29, sub-s. 1 was passed to remove the difficulty which had arisen in *Rex* v. *Sheridan* (1) and *Rex* v. *Grant* (2); it gives the justices power to hear the case and to decide whether or not to convict; and it gives them power, if they do decide to convict, and if they think fit after hearing the prisoner's antecedents, to send him forward to quarter sessions for sentence. But that power only exists (except as regards offences set out in sch. II to the Act of 1925) where the case is one which falls within s. 28, sub-s. 2 of the Act of 1948.

Section 28, sub-s. 1 is applicable to a variety of cases: a very common one is driving to the danger of the public, which may be tried either summarily or on indictment. It covers also certain offences which the Bankruptcy Act, 1914, provides may be tried summarily or on indictment; and if the justices proceed under sub.s. 1 to deal with them as summary offences, they are summary offences only. Therefore it is quite clear, and it is not argued to the contrary, that in respect of this class of case s. 29, sub-s. 1 has no application; for it applies only to offences which are indictable and can only be tried summarily with the consent of the accused person.

We have not heard very much about the nature of the offences in question in the present case; but I wish to repeat what has been said before in this court, especially in *Rex* v. *Bodmin Justices; Ex parte McEwen* (3): that the fact that

(1) [1937] 1 K. B. 223.

(2) (1936) 52 T. L. R. 676.

(3) [1947] K. B. 321.

justices have power to try cases is no reason why they should necessarily do so. When a case is of a serious character—and where a man commits thirteen bankruptcy offences, it is surely a serious case—it ought to go to trial on indictment. It is not merely a question of sentence ; it may be that when the case does go for trial the court of trial will think it necessary only to impose a nominal sentence or even bind over. That is not the point ; serious cases ought to be dealt with by superior courts. If the justices had been asked to send this case for trial in the first instance, there is no reason to suppose that they would not have done so, and this trouble would never have arisen. But they were asked by counsel for the prosecution, who represented the Director of Public Prosecutions, to try the case summarily, and it is not surprising therefore that they consented to do so.

When the justices heard that they were to take into consideration seven offences in addition to the six of which they had convicted this defendant, they decided, not unnaturally, that the maximum sentence that they could give him was inadequate. Thereupon, no one taking any objection, they decided to send the case forward under s. 29, sub-s. 1 of the Act of 1948 to quarter sessions for sentence. As they were lay justices I attach no blame to them. It is certainly remarkable, however, that their clerk did not point out to them that if they did send him forward for trial they must, by the express terms of s. 29, sub-s. 1, send him forward in custody. They admitted him to bail, and, that, again, was wrong.

[His Lordship described what took place before quarter sessions and subsequently, as above recited, and continued :] The first point made by the Attorney-General is that the decision of the justices to send this defendant forward for sentence was a mere nullity, and that therefore the proceedings before the justices had never been concluded. Mr. Widgery, however, on behalf of the defendant, submitted that the decision of the justices was a judgment, and therefore that, as they had convicted and proceeded to judgment, they were functi officio and no further proceedings could be taken against the defendant. He likened the case to that where, as has so often happened, justices have imposed a penalty which they had no power to impose. If, for instance, a statute empowers justices to impose a maximum sentence of three months' imprisonment and they by mistake impose one of six months, it has been held that the conviction is bad on its face : it records a penalty which the crime in question does not carry. This court has always quashed the conviction on such facts: see, for example, *Rex* v. *Willesden Justices*; *Ex parte Utley* (1).

The first question is whether there has been a judgment here. In my opinion there has not. In my opinion the effect of s. 29, sub-s. 1 of the Criminal Justice Act, 1948, is that, if justices for the reason there prescribed have come to the conclusion that their powers are not sufficient, they may abstain from pronouncing judgment and send a case forward to quarter sessions to pass judgment. The case is in fact not disposed of. It has by virtue of s. 29, sub-s. 1 become a sort of composite case in which power is given to one court to convict and to another to give judgment; and until the judgment is given the hearing of the case is not complete. It is the judgment given by quarter sessions that finally determines the case. It seems to me that, if we were to hold that an order by justices sending a case forward under s. 29, sub-s. 1, were a judgment, we should be going very near to holding that a committal for trial in an indictable case was a judgment. Whereas if such a committal for trial were a final judgment, refusal by justices to send a case for trial would equally be a judgment, which everybody knows it is not. If justices, sitting as examining justices taking depositions, come to the conclusion that a prima facie case is not disclosed and discharge the defendant under the Summary Jurisdiction Act, 1848, it is always open to the prosecution, if further evidence comes to their hand, to take subsequent proceedings and go on with the case. There is certainly no authority, so far as I am aware, which lays down that a committal for trial is anything but a step in a proceeding. It has never been decided that it is a judgment, and I cannot see myself how it can be said that the sending forward of a defendant by justices under s. 29, sub-s. 1 of the Act of 1948 in order that quarter sessions may pass judgment in lieu of the judgment which the justices might have passed can be said to be a judgment, for the subsection says that "in lieu of dealing with him in any manner "in which the court has power to deal with him" the justices can commit a defendant for sentence.

We have assistance from *Rex* v. *Kenworthy* (2). The record of a trial for perjury at the Chester summer assizes recited: "It is therefore ordered that he, the said Lawrence Kenworthy, "be transported." It was brought up on error, and there was

(1) [1948] 1 K. B. 397.

(2) (1823) 1 B. & C. 711.

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nothing in the record to show that it had been adjudged. It was argued in that case that judgment ought to be reversed, and Abbott, C.J., in the course of that argument said: "Perhaps "no judgment at all has been given; and if so, there cannot be "any reversal." I observe that counsel in arguing said: "In Coke (4 Inst., p. 70) there is this passage: 'This con"'clusion followeth, that the king hath committed and "'distributed all his whole power of judicature to several "'courts of justice, and therefore the judgment must be, "'*ideo consideratum est per curiam.*'" There are other authorities which show that the test of judgment is whether, in the formal record of the court, those words "*ideo con*"*sideratum est*" appear. It was for that reason that it was always held that error did not lie to reverse the decision of a court given on an application for one of the prerogative writs where the words "*ideo consideratum est*" did not appear in the order of the court: see *Rex* v. *Dean & Chapter of Dublin* (1); *Pender* v. *Herle* (2).

In *Rex* v. *Kenworthy* (3), Abbott C.J., giving judgment, said: "By the act in question, two things are required to be "done by the court before which the party is tried: an order "for transportation is to be made, and thereupon judgment "is to be given. Now, here, the court made an order not "followed by a judgment. There is no doubt that, at common "law, where the punishment is not discretionary, the record "of an inferior court may be removed into this court, and we "may pronounce judgment; but in this instance we cannot "do so. Inasmuch, therefore, as no judgment has been "entered below, and this court has no power to supply the "deficiency, the proper course appears to be for us now to "order the court below to proceed to give judgment on the "conviction,"—and a procedendo was awarded. That seems to me to show what is necessary to a finding that there has been a judgment: there must have been something which puts an end to the case; there must be a final adjudication; and there has been no final adjudication in the present case. Therefore in my opinion the justices were not functi officio.

Then comes the question what ought to be done. The committal to quarter sessions for sentence was a nullity, and the case had never been finally determined. It seems to me therefore that the position is really the same as it would

(1) (1724) 1 Stra. 536.
(2) (1725) 3 Bro. P. C. 505.
(3) 1 B. & C. 711.

have been if the court, instead of committing the defendant to quarter sessions, had merely convicted and had not proceeded to give a judgment, or had adjourned the case for that purpose. They did not adjourn the case: if they had, these questions would not have arisen, but the position would have been the same. The justices must therefore finish the case, and all that is necessary for that, as it seems to me, is that notice should be given to the prisoner that on such and such a day the court will proceed further to hear his case. I think that notice can be given quite informally. If the justices here had not felt obliged to wait and see what this court would do, and had taken their courage in both hands and decided to go on with the case on February 27, 1950, the return day of the fresh summonses, and had ordered the defendant into court, no objection could have been taken by him to anything as having been done illegally.

It is true that these fresh summonses required the defendant to appear and "answer the information," and I think that it would have been better if those words had not been included. But it does not seem to me that it matters what was the form of the notice that was given to the defendant to appear: the case had not been finished and it had to be finished. Therefore, as soon as the prisoner was told that the case would be finished on a certain day and that he was to appear, the court could, if he did not appear, have sentenced him in his absence and then issued a warrant to have him conveyed to prison in accordance with the sentence. At any rate, they could have issued a warrant against him for not appearing; for where a summons is adjourned from time to time, either part heard or because it has not been gone into, and the defendant does not appear, the court can issue a warrant calling upon him to appear where it thinks it desirable that he should appear because a sentence of imprisonment may follow. I think therefore that on February 27, 1950, the justices had not only the power but the duty to pass sentence on this defendant in order that these proceedings might be brought to an end by a judgment of the court.

It is not a case in which justices were acting unreasonably or recalcitrantly: they wanted guidance in a position which had arisen largely because professional representatives had not kept them straight on this difficult point arising out of this change in the law.

Therefore there should be an order of mandamus directing the justices, not to hear and determine the case, but "to "impose a sentence upon the said Leonard Pocock in respect "of the offence of which they have convicted him."

HUMPHREYS J. I entirely agree with the judgment which my Lord has pronounced. It is now admitted that the committal by the justices of the defendant to quarter sessions for sentence was a nullity: they had no more power to order this man to appear before quarter sessions on bail to receive sentence than they had to order him to be executed. Their only power to order him to appear before quarter sessions for sentence was that given by s. 29, sub-s. 1 of the Criminal Justice Act, 1948, which prescribes in terms the particular cases in which they may take that course; and this is not one of them. Therefore quarter sessions quite properly held that they had no power to entertain the matter.

The question which now arises is this: quarter sessions having declined to act, what power, if any, have the justices at petty sessions of continuing the hearing? It is said on the one hand that they have no such power at all because they have adjudicated: they have heard the informations and have convicted. The answer seems to me to be that a court of summary jurisdiction does not complete the hearing of an information merely by convicting, because that leaves in the air, without any judgment upon the matter one way or the other, the most important part of a hearing, namely, the sentence of the court. It seems to me that the position then was that the justices, having issued summonses, were under a duty to hear and determine them and not to leave the case until they had done so. They had not completed that hearing by merely convicting, because there was something else which they still had to do. In my view, it is quite wrong to say that they had given a judgment of some sort in the matter.

I think that although the justices made an order—which they had no power to make though they thought that they had—they did not attempt to give any judgment at all on the finding of guilt which they had recorded. That being so, when the matter came back to them, their duty was to continue and complete the adjudication upon these informations.

Though I am not sure that it is right to say that it has really arisen in this case, the question has been argued what is to happen if the accused person, the man who has been convicted, does not come before the justices at petty sessions to be sentenced. The course taken here was to serve what were thought to be further summonses upon him. The word "summons" has acquired a technical meaning, and I certainly think, with my Lord, that it would have been better that the word "summons" should have been left out altogether so as to make it clear that the justices were not purporting to issue fresh summonses in regard to these matters when requiring the defendant to reappear before them. They were merely telling a man in regard to whose case it then appeared that there had been no finality, so that it was still sub judice, that he must attend the court in order that he might be heard, and in order that the court, having heard him, might finally adjudicate upon the matter. I think that a simple notice telling him to appear and attend on the court in that way was all that was required. The notice should have told him that on the named day the justices would proceed to hear him and consider the appropriate sentence to be passed. In point of fact this convicted man did attend in person at the door of the court; but he did not go inside it: he attended in court by his solicitor. I have no doubt that if the justices had decided to go on with the case and do what quarter sessions had said that they ought to do, that was, themselves to pass sentence, his solicitor would have called him in. That, I imagine, was why the solicitor had brought him there. But the justices said that they had no power to deal with him, whereupon the solicitor, no doubt, told his client to go away, as he was perfectly entitled to do. I do not think myself that the solicitor acted in any way wrongly in not producing his client on that occasion.

If the convicted man, after the service upon him and the justices of the order of this court which my Lord has proposed—to which I agree—should be unwise enough to pay no attention to it, and to fail to attend the next time, I have no doubt whatever that there is ample power both in this court and in the justices to compel him. The justices will be in the position that they have been ordered by this court to hear a matter which necessitates the appearance of the accused person, or, at all events, makes it very desirable. If he does not attend there is ample power in that bench of justices to bring him before them with the assistance (as was said in *Reg.* v. *Haden Corser* (1)) of a policeman if necessary. But that position has not arisen because I do not think that this defendant has ever refused to attend upon the justices in the event of his receiving the notice which I assume that he will now receive. I agree that an order of mandamus should be made in the form which my Lord has proposed.

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(1) 8 T. L. R. 563.

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BYRNE J. I agree.

MORRIS J. I also agree.

FINNEMORE J. I agree.

Order of mandamus.

Solicitors: *Director of Public Prosecutions; Treasury Solicitor; Metcalfe, Copeman & Pettefar.*

(1) 8 T. L. R. 563.

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[1951] 1 K. B. 316

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Mar. 6, 7, 28.

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Workmen's compensation—National Insurance—Transitional provisions—Notional accident—Dermatitis—" Appointed day " under National Insurance (Industrial Injuries) Acts, 1946*—Certificate given by certifying surgeon after that date—Certified date of disablement before that date—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 43*—National Insurance (Industrial Injuries) Act,* 1946 (9 & 10 *Geo.* 6, *c.* 62), *s.* 89, *sub-s.* 1.

The appointed day under the National Insurance (Industrial Injuries) Act, 1946, was July 5, 1948. A certifying surgeon on August 17, 1948, purporting to act under s. 43 of the Workmen's Compensation Act, 1925, certified that a workman was suffering from dermatitis produced by dust or liquids and that the date of disablement was February 6, 1948. The workman claimed compensation under the Act of 1925.

Held, (1.) following *Hales* v. *Bolton Leathers Ld.* [1950] 1 K. B. 493, that the right to compensation under the Act of 1925 did not arise until the time of the disability or incapacity; (2.) that under s. 43 of the Act of 1925, until a certificate was given, there was no right to compensation; and (3.) that on August 17, 1948, the certifying surgeon was functus officio and could not found a right to compensation by giving a certificate.

Accordingly the claim to compensation was barred by sub-s. 1 of s. 89 of the Act of 1946, this not being a case which came within the first part of proviso (*a*) to that sub-section where " a right to " compensation arises or has arisen in respect of employment " before the appointed day."

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Per curiam. It was true that this construction—as the law stood—left a hiatus where a workman might have no remedy for the period between the date of the contraction of the disease and the appointed day—a hiatus which, on the facts of the case, did not exist; but the Minister of National Insurance, should he think fit to do so, could bridge the gap by acting under the power conferred upon him by proviso (*b*) to sub-s. 1 of s. 89 of the Act of 1946.

APPEAL from Gloucester county court.

The applicant workman claimed compensation under s. 43 of the Workmen's Compensation Act, 1925, alleging that the date of disablement from dermatitis produced by dust or liquids, was February 6, 1948, that being the date so certified by a certificate dated August 17, 1948, of a certifying surgeon appointed under the Act of 1925. The appointed day under the National Insurance (Industrial Injuries) Act, 1946, was July 5, 1948.

Regulations had been made under s. 55 of the Act of 1946, and it was agreed that the relevant effect of them was that a workman who was found to be suffering from dermatitis, such as that suffered by the applicant, after the appointed day, July 5, 1948, could recover benefit for any period of disablement or incapacity subsequent to that date, and that there was no provision enabling him to do so for any earlier period of incapacity, unless he had obtained a certificate of a certifying surgeon before the appointed day and could rely on proviso (*a*) to s. 89, sub-s. 1, of the Act of 1946 (1).

(1) National Insurance (Industrial Injuries) Act, 1946, s. 89, sub-s. 1: "Workmen's compensation shall not be payable in "respect of any employment on "or after the appointed day, "and accordingly the enactments set out in the 9th "Schedule to this Act" (which included the whole of the Workmen's Compensation Act, 1925) "are hereby repealed as from that "day to the extent mentioned "in the 3rd column of that "Schedule: Provided that— "(*a*) the said enactments shall "continue to apply to cases to "which they would have applied "if this Act had not been passed, "being cases where a right to "compensation arises or has "arisen in respect of employment "before the appointed day, except "where, in the case of a disease "or injury, prescribed for the "purposes of Part IV. of this "Act, the right does not arise "before the appointed day and "the workman, before it does "arise, has been insured under "this Act against that disease "or injury: (*b*) regulations may "make such transitional or consequential provisions as appear "to the Minister to be necessary "or expedient, having regard "to the repeal of the said enactments in relation to diseases "and to injuries not caused by "accident . . . ."

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The employers, making no admission as to facts, raised a preliminary objection on the ground that the workman's right to compensation did not exist until a certificate was given by a certifying surgeon, and that, since that certificate was not given until after the appointed day, the workman had no right to workmen's compensation.

Judge Sir Gerald Hurst K.C., upheld the objection, saying that on August 17, 1948, when the certificate was given, s. 43 of the Act of 1925 no longer existed and that on July 5, 1948, the certifying surgeon was functus officio so far as the Act of 1925 was concerned, and could thenceforward give no certificate under that Act.

From that award the applicant, the workman, appealed.

Beney K.C., and *Eric Falk* for the workman.

Lloyd-Jones K.C. and *Lyne* for the employers.

The arguments will be found set out in the judgment of Cohen L.J.

Cur. adv. vult.

Mar. 28. COHEN L.J., read the following judgment: The first part of proviso (*a*) to s. 89, sub-s. 1 of the National Insurance (Industrial Accidents) Act, 1946, applies to all accidents, notional as well as actual. Its effect has been considered by this Court in *Hales* v. *Bolton Leathers Ld.* (1), the judgment of the court being delivered by Somervell L.J. who, considering the position in the case of an actual accident, said (2): "We will take a case put by Bucknill L.J., in "the course of the argument—that of a groom kicked by "a horse before the appointed day. The groom is not "'disabled' at the time and is able to carry on with his "work. After the appointed day injury develops and he "has to go to hospital. His right to compensation, as it "seems to us, 'arises' at the time of his disability or "incapacity. The Act of 1925 gives compensation, not for "pain and suffering, but for total or partial incapacity. But in "the case put, this right, though arising after the appointed "day, is in respect of employment before the appointed day, "and proviso (*a*) to sub-s. 1 of s. 89, preserves his rights under "the Workmen's Compensation Acts. The case where in-"capacity is continuing at the appointed day is plainly

(1) [1950] 1 K. B. 493. (2) Ibid. 504.

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" covered. There is also, as it seems to us, no difficulty about " the case where there has been a temporary recovery at the " appointed day, but later incapacity, the result of the pre-" appointed day injury, re-develops. This re-development " gives a right to compensation which 'arises' after the " appointed day, but it is in respect of employment before the " appointed day. If this is right, then the words 'the right " 'to compensation' are given what seem to us their natural " construction, and, so far as ordinary accidents are con-" cerned the provisions clearly mean what one would expect " them to mean." From this passage it is clear that in the case of an ordinary accident, i.e., an accident which is not a notional accident within the meaning of s. 43 of the Act of 1925, the proviso will operate if the accident arose out of employment before the appointed day, notwithstanding that the right to compensation (which arises only at the time of disablement or incapacity) does not arise until after the appointed day.

We are, however, concerned not with an ordinary accident but with a notional accident, and I must therefore refer to s. 43 of the Act of 1925, which, so far as material, provides as follows. Sub-section 1 provides: " Where (i.) the certifying " surgeon appointed under the Factory and Workshop Act, " 1901, for the district in which a workman is employed " certifies that the workman is suffering from a disease men-" tioned in the third Schedule to this Act and is thereby " disabled from earning full wages at the work at which he was " employed; . . . . and the disease is due to the nature of " any employment in which the workman was employed at " any time within the twelve months previous to the date of " the disablement . . . . , whether under one or more " employers, he or his dependants shall be entitled to com-" pensation under this Act as if the disease . . . . were a " personal injury by accident arising out of and in the course " of that employment, subject to the following modifica-" tions:—(*a*) The disablement . . . . shall be treated as the " happening of the accident . . . ." Sub-section 2 provides: " For the purposes of this section the date of disablement shall " be such date as the certifying surgeon certifies as the date " on which the disablement commenced, or, if he is unable to " certify such a date, the date on which the certificate is " given." Then there are provisoes which I need not read.

As regards notional accidents, Somervell L.J. said that the early part of proviso (*a*) to sub-s. 1. of s. 89 of the Act of

1946, does not apply completely at any rate to the case of industrial diseases. None the less, Mr. Beney and Mr. Falk have contended that the principle laid down by Somervell L.J. applies equally to the notional accident in this case. They put their case in two ways. First, they say that the certificate is mere matter of proof, not a necessary element in the right, and that, although the certificate was not given until after the appointed day, it has retrospective effect under sub-s. 2 of s. 43 of the Act of 1925. Secondly, they say that, having regard to the interpretation placed on the first part of proviso (*a*) by Somervell L.J., the exception in it should be construed as if it read "if the right does not arise out of "employment before the appointed day." On that construction they say that, as the disability plainly arose out of employment before the appointed day, they are not within the exception to the proviso.

Mr. Lloyd-Jones and Mr. Lyne, for the employers, seek to support the conclusion of the judge by saying that (1.) s. 43, sub-s. 1, by its very terms makes the giving of a certificate a sine qua non and, indeed, the first step in founding a right to compensation; and (2.), no certificate having been given before the appointed day, no right to compensation can have arisen before that day and it can never arise thereafter since, under the opening words of s. 89, sub-s. 1 of the Act of 1946, s. 43 of the Act of 1925 has been repealed; and (3.) the court need not therefore consider the exception to the proviso since the applicant never brought himself within the opening part of it. This construction, they say, does not make the proviso meaningless in the case of notional accidents, since, if a certificate had been given before the appointed day, the proviso would operate and it would be necessary to preserve the old Acts in operation for many purposes, e.g., for the purpose of review under s. 11 of the Act of 1925.

Mr. Beney argued that this construction would lead to strange results, for instance, if A. and B. both had similar notional accidents on the same date and one obtained a certificate before the appointed day but the other did not, they would have different rights, although their cases were indistinguishable. I am not, however, impressed by this argument: it seems to me that the policy of the Act is to make a clean cut and to provide that any rights accruing after the appointed day should be dealt with under the new Act.

A more serious criticism of Mr. Lloyd-Jones' argument is, of course, that it would leave a hiatus. Mr. Beney says that there are cases where the workman would have no remedy for the period between the date of contraction of the disease and the appointed day. To appreciate this criticism I must turn to the provisions of the Act of 1946. Section 1, sub-s. 1, provides: "Subject to the provisions of this Act, all persons "employed in insurable employment shall be insured in "manner provided by this Act against personal injury caused "on or after the appointed day by accident arising out of and "in the course of such employment." Part IV concerns notional accidents arising out of industrial diseases and industrial injuries not caused by accident. Section 55, sub-s. 1, on that Part, provides: "Subject to the provisions of this "Part of this Act, a person who is under this Act insured "against personal injury caused by accident arising out of and "in the course of his employment shall be insured also against "any prescribed disease and against any prescribed personal "injury not so caused, being a disease or injury due to the "nature of that employment and developed on or after the "appointed day." Sub-section 2 gives power to the Minister to prescribe what diseases are to be included under Part IV. Sub-section 3 enables him to include in regulations made under sub-s. 2 a provision ante-dating the effect of the regulations to any specified date not being earlier than the appointed day.

Sub-section 4 provides as follows: "Provision may be "made by regulations for determining the time at which "a person is to be treated for the purposes of this Act as having "developed any disease or injury prescribed for the purposes "of this Part of this Act, and the circumstances in which "any such disease or injury is, where the person in question "has previously suffered therefrom, to be treated as having "recrudesced or as having been contracted or received afresh."

Regulations have been made under the above powers which are difficult to construe. I need not, I think, refer to them in detail since it was agreed that the effect of them is that a workman who was found to be suffering from dermatitis after the appointed day would recover benefit for any period of disablement or incapacity subsequent to that date, but that there is no provision enabling him to do so in respect of any earlier period of incapacity, unless, of course, he had obtained a certificate of a certifying surgeon before the appointed date and could rely on proviso (*a*) to sub-s. 1 of s. 89.

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Mr. Beney was therefore right in saying that under the Act and regulations as they stand there is a hiatus not covered by either Act. No doubt it was not Parliament's intention to leave such a hiatus, and, if there is an ambiguity in the construction of s. 89, sub-s. 1, we might adopt that construction which would fill the gap. I am, however, unable to find that ambiguity. It is, I think, clear from what was said by Somervell L.J. in *Hales* v. *Bolton Leathers, Ld.* (1), that the right to compensation does not arise until the time of the disability or incapacity. It is also, I think, plain that under s. 43, until a certificate is given there is no right to compensation at all. In these circumstances, I think that Mr. Lloyd-Jones was justified in saying that, in any case, where there was no certificate before the appointed day, the certifying surgeon was functus officio and could not thereafter found a right by giving a certificate.

I arrive at this conclusion with less reluctance because (*a*) in the present case, on the facts, the hiatus does not exist; and (*b*) I think Mr. Beney right in suggesting that the Minister could, if he thought fit so to do, bridge the gap by regulation under the power conferred by proviso (*b*) to sub-s.1 of s. 89, For these reasons I am of opinion that the appeal should be dismissed. Asquith L.J. has asked me to say that he has read this judgment and agrees with it.

SINGLETON L.J.: I agree.

Appeal dismissed

Solicitors: *W. H. Thompson; Peacock and Goddard, for Cartwright, Taylor and Corpe, Bristol.*

(1) [1950] 1 K. B. 493.

C. G. M.

Considered. MOORE *v.* RAY [1951] 1 K. B. 98

BASTIN *v.* DAVIES.

1950
Apl. 26.

Lord Goddard C.J., Morris and Finnemore JJ.

Food and Drugs—Article of food "not of . . . . nature or substance or "quality"—Separate offences—Information alleging all three defects disjunctively—Uncertainty—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 56), *s.* 3, *sub-s.* 1.

Section 3, sub-s. 1 of the Food and Drugs Act, 1938, creates the three distinct offences of selling to the prejudice of the

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purchaser food which is not of (*a*) the nature, (*b*) the substance, (*c*) the quality of the food demanded. Accordingly an information which charges the sale of an article of food which was not of the nature or not of the substance or not of the quality of the article demanded is bad for uncertainty.

Quaere whether an information would be good which alleged that the article was neither of the nature nor of the substance nor of the quality of the article demanded.

Thomson v. *Knights* [1947] K. B. 336 distinguished.

CASE STATED by Brecon justices.

At a court of summary jurisdiction sitting at Hay an information was preferred by the appellant, Gerald Elwin Bastin, chief inspector of food and drugs to Breconshire County Council, against the respondent, Jack Edward Davies, alleging that on October 5, 1949, he sold to the prejudice of the purchaser a certain article of food, to wit, beef sausages, which was not of the nature or not of the substance or not of quality of the article demanded in that it was 32.6 per cent deficient in meat, contrary to s. 3 of the Food and Drugs Act, 1938.

At the hearing of the information it was contended for the defendant that the information was bad in law on the ground that it disclosed three separate and distinct offences, referable, respectively, to "nature," "substance" and "quality," whereas it should have contained an allegation of one only of those matters.

For the prosecutor it was contended that s. 3 of the Act of 1938 had the effect of creating one offence only; that the words, "nature," "substance" and "quality" were only used incidentally; that they bore a similar meaning and were impossible to differentiate; and that the information was therefore correctly drawn. The attention of the justices was drawn to *Jones* v. *Sherwood* (1) and *Edwards* v. *Jones* (2).

The justices dismissed the information, being of opinion that it was bad for duplicity.

The prosecutor appealed.

Gattie for the prosecutor. The offence here is one of selling food to the prejudice of the purchaser. The food may be bad in three different ways. The purchaser may receive something which constitutes an offence against all three, and it would therefore be unsafe to omit any of the words, "nature,"

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(1) [1942] 1 K. B. 127.

(2) [1947] K. B. 659.

"quality," or "substance." The inclusion of all three words does not make the information bad. It is not necessary for the information to follow the exact words of the statute, and the justices could have made the necessary amendment had they wished. It matters not whether the food demanded is deficient in its nature," its "quality" or its "substance": those words are purely adjectival. It is the analyst's certificate which always shows the offence, here one of quality. [He referred to *Jones* v. *Sherwood* (1), *Edwards* v. *Jones* (2), *Thomson* v. *Knights* (3) and Bell's Sale of Food and Drugs (12th ed.) p. 94.]

The respondent did not appear and was not represented.

LORD GODDARD C.J., read the information and continued: The point taken for the defendant, to which the justices gave effect, was that this information was bad for duplicity, in that it disclosed three offences. The blemish, however, if any, is not duplicity but uncertainty. Duplicity consists in charging two or more separate offences in one information or count conjunctively: uncertainty arises when two or more offences are so charged in the alternative or disjunctively, for obviously such a procedure leaves it quite uncertain with which of those offences the defendant is charged, and the conviction, which must follow the information, would also leave it in doubt of which offence the defendant had been found guilty. The question therefore is whether this information did in fact charge three offences in the alternative, or disjunctively, or whether it disclosed only one offence.

Mr. Gattie has argued that the real offence here is selling to the prejudice of the purchaser and that the other words only show the matters in which the article of food may be to the prejudice of the purchaser. He relied particularly on *Thomson* v. *Knights* (3). In that case a man had been convicted of being in charge of a motor car while under the influence of drink or a drug. It was contended that the information was bad for uncertainty because it was one offence to be in charge of a vehicle while under the influence of drink and another to be in charge of a vehicle while under the influence of a drug. The court rejected that argument, saying that the offence was that of driving in a state of intoxication, it mattered not whether the toxic condition was induced by drink or a drug.

(1) [1942] 1 K. B. 127.
(2) [1947] K. B. 659.
(3) Ibid 336.

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In my opinion, the reasoning of that case does not apply to this case, because I think that the defendant is entitled to be told by the prosecution whether they are saying that the article is not of the nature demanded or not of the quality demanded.

With regard to the meaning of the word " substance " it is not necessary to give a considered opinion, but I think that the view of the author of Bell's Sale of Food and Drugs (12th ed.) p. 94 is probably right, that " substance " would include matters where there had been adulteration of the article. However that may be, I think that the prosecution must decide what they are going to allege. If they are in doubt, they can issue more than one information against the defendant, charging him with selling to the prejudice of the purchaser in that in the one case the nature of the article was not as demanded and in the next it was not of the quality demanded. That is because the conviction must be drawn up in accordance with and following the information so that it can be seen on what charge the justices convicted. I think that these are different offences in the sense that the constituent facts in the offence would be, or may be, different.

The view which the justices took was in accordance with, and no doubt influenced by, the view put forward in Bell's Sale of Food and Drugs (12th ed.) at p. 94. Note (*e*) which appears there states: "It should usually be possible to decide " which of the three words is most appropriate to use in an " information and to use that word only. Thus, apples or " fish not of the variety or kind asked for, are not of the " ' nature ' demanded. For articles not containing the " proper ingredients or containing some added adulterant, " ' substance ' is perhaps the most appropriate word to use, " although in many instances, ' quality ' would also be fitting. " If preserved eggs are sold as new laid eggs, the word ' quality ' " would seem apt. In any event, the summons should not " be for selling food ' not of the nature, substance or quality.' "

We need not decide whether, if the information had alleged deficiency in " nature, substance and quality," it would have been good. The charges are made disjunctively here, the information alleging that the beef sausage was not of the nature or not of the substance or not of the quality demanded. I bear in mind that this note has appeared in many editions of Bell's work. This court would never hesitate to disagree with a statement in a textbook, however authoritative, or

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however long it had stood, if it thought right to do so. In fact, it has had occasion, I think, in the past to differ from statements in Stone's Justices' Manual, which justices are accustomed to treat with almost the respect paid to the Bible. Communis error facit jus is a maxim of very limited application; but, as Lord Ellenborough C.J., said in *Isherwood* v. *Oldknow* (1), it is truer to say "communis opinio is evidence of what the "law is." It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known textbook for a great number of years without being judicially doubted and after it had been acted on by justices and their clerks for many years. In my opinion, however, this statement in Bell is right; though if I had doubt about it, I should resolve the doubt in favour of the statement because it has been treated as the law for a great number of years and has never been dissented from. I think that, on analysis of the matter, it is clear that the justices came to a right decision though the reason that they gave for it was technically wrong. This appeal should be dismissed.

MORRIS J. I agree.

FINNEMORE J. I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for C. M. S. Wells, Brecon.*

L. F. J. McD.

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(1) (1815) 3 M. & S. 382, 396.

WALTER *v.* ETON RURAL DISTRICT COUNCIL AND OTHERS.

[1948. W. 2993.]

Affirmed.
[1951] 1 K. B. 84

1950
Mar. 13.

Lord Goddard C.J.,

Local government—Superannuation—Employee of rural district council —Claim to allowance on retirement—Superannuation fund maintained by county council—County council's refusal of allowance affirmed by Minister on appeal—Employee's rights—" Authority

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"concerned"—Local Government Superannuation Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 68), *s.* 8, *sub-s.* 1, *and s.* 35.

From April, 1930, until July, 1947, the plaintiff was an employee of a rural district council. During his employment he contributed to a superannuation fund maintained by virtue of the Local Government Superannuation Act, 1937, by the county council as "administering authority." In 1947, the rural district council agreed to his retirement on the ground of ill-health, and that he was entitled to a superannuation allowance under s. 8 of the Act. The county council, however, after considering medical reports, refused to pay the plaintiff an allowance. His appeal to the Minister of Health was dismissed. In his action for a declaration that he was entitled to an annual superannuation allowance under the Act,

Held, that the county council, being constituted by the Act of 1937 the "administering authority" in respect of the superannuation fund, were the "authority concerned" within the meaning of s. 35; that it was accordingly for them to decide in the first instance any dispute as to an employee's right to superannuation; and that, as the plaintiff had appealed from the decision of the "authority concerned" to the Minister of Health as provided by s. 35, his action would not lie.

ACTION.

The plaintiff, Edward Frank Walter, was from April 1, 1930, until July 31, 1947, employed by the first defendants, Eton Rural District Council, in various capacities, and finally as committee clerk. Both the plaintiff and the rural district council contributed to a superannuation fund maintained by the second defendants, Buckinghamshire County Council, from the day the fund was set up by the latter under the Local Government Superannuation Act, 1937. By a letter dated May 13, 1947, the plaintiff gave notice to the rural district council that he desired to resign his appointment on the ground of ill-health, and he enclosed with that letter the following medical report signed by an eye specialist: "I certify that the "patch of choroditis in [the plaintiff's] left eye is permanent "and precludes his being able to read or clearly distinguish "things with that eye; his general health is not very good "and I strongly advise him to obtain light out-of-door employ-"ment as soon as possible as I am of the opinion that by "doing so it will considerably lessen the possibility of any "further damage to his sight."

The letter and medical report were considered by the rural district council, who on May 27, 1947, accepted the plaintiff's resignation, expressed themselves satisfied with the medical evidence produced, and passed the following resolution: "The committee recommend that [the plaintiff] be granted, "as from the operative date of his resignation, namely July 31, "1947, an allowance under the Superannuation Acts . . . . "and that the clerk and treasurer be instructed to take all "necessary steps in connexion therewith and to approach "the Buckinghamshire County Council as necessary, as the "authority administering the superannuation scheme." The rural district council communicated that resolution to the county council, who obtained a further medical report on the plaintiff's condition, and, after considering both medical reports, refused to pay him any superannuation allowance. The plaintiff appealed to the Minister of Health under s. 35 of the Act of 1937. The Minister by a letter to the plaintiff dated January 2, 1948, gave his decision in the following terms: "The Minister has considered carefully all the facts "and representations submitted. Having regard to the "medical evidence he is advised that at the time you ceased "to be employed by the rural district council you could not "be considered as being incapable of discharging efficiently "the duties of your employment by reason of permanent "ill-health or infirmity of mind or body within the meaning "of [s. 8, sub-s. 1 of the Act]. The Minister hereby determines accordingly and dismisses your appeal."

The plaintiff brought this action against the rural district council and the county council, claiming a declaration that he was entitled to an annual superannuation allowance under the Act (1).

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(1) Local Government Superannuation Act, 1937, s. 8, sub-s. 1: "Subject to the provisions of "this Act, a contributory "employee of an employing "authority shall be entitled, on "ceasing to be employed by "them, to receive an annual "superannuation allowance if he "either—(*a*) has completed ten "years' service and is incapable "of discharging efficiently the "duties of his employment by "reason of permanent ill-health "or infirmity of mind or "body . . . ."

Section 35: "Any question "concerning the rights or "liabilities of an employee of a "local authority, or of a person "claiming to be treated as such "an employee, under any of the "provisions of Part I. or this "Part of this Act, or any regulations made under this Act, "shall be decided in the first "instance by the authority concerned, and if the employee is "dissatisfied with any such "decision or with the authority's "failure to come to a decision, "shall be determined by the "Minister, and the Minister's "determination shall be final . . ."

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H. B. Williams K.C. and *Maurice Lyell* for the plaintiff. The whole issue in this case is, who are the "authority concerned" within the meaning of s. 35 of the Act of 1937. The words "authority concerned" may have been used deliberately to cover whichever authority may be appropriate in the particular circumstances. Eton Rural District Council employed the plaintiff. It was within their discretion, subject to certain limits, whether to determine his employment or not. They were satisfied as to his incapacity to continue work. If they determined his employment on grounds which would entitle him to a superannuation allowance, then they should be the authority to decide whether or not he was entitled to that allowance. It is wrong that another authority should decide as to the fitness of the plaintiff for an employment of which they know nothing.

It is true that s. 35 of the Act confines decision on any question concerning the employee's rights to the "authority concerned," and that an appeal from their decision lies only to the Minister of Health. But if the plaintiff is right, and the "authority concerned" is the employing authority, then the intervention of Buckinghamshire County Council is vitiated and the appeal to the Minister a nullity, since there was no appeal from Eton Rural District Council's decision.

It would not be right to say that the definition of "authority concerned" for which the plaintiff contends might place an extra burden on other contributors to the fund, because, although the employing authority have power to increase the superannuation allowance under s. 8, sub-s. 2, they must make good the increase themselves. So also, under ss. 21 and 22, if there is a deficiency in a superannuation fund, then any employing authority must make such contribution as an actuary may determine is appropriate to their responsibility for the deficiency.

Heathcote-Williams K.C. and *R. H. Bernstein* for the rural district council.

Simes K.C. and *W. L. Roots* for the county council. In order to decide who is the "authority concerned," regard must be had to the whole scheme of the Act. The Act is related to an employee's rights to payment of superannuation. It sets up a fund to be maintained by an administering authority, and, once the fund has been set up, s. 8 gives a right to payment out of that fund in certain circumstances. The authority to decide the right to payment must be the authority administering the fund. In only one case has Parliament expressly decided otherwise, and that is in s. 10, sub-s. 4, where an employing authority has power to " direct " the return of superannuation contributions to an employee dismissed for misconduct.

The relationship under this Act is one between the employee and the administering authority. Provision has been made by regulation (St. R. & O. 1939, No. 330, reg. 4 (2) (1) for the transmission from the employing authority to the administering authority of any necessary information.

It is quite clear that any question arising between an employee and the authority concerned with the administration of the fund must be decided by the Minister of Health.

LORD GODDARD C.J. The county council say, in effect, that the question whether the plaintiff is entitled to a superannuation allowance has to be decided by them and not by the rural district council, and, further, that the matter has been decided, that the plaintiff has duly appealed to the Minister of Health under s. 35 of the Act, and that the Minister has dismissed his appeal.

[His Lordship referred to the facts and continued :] The scheme of the Act is that a fund has to be established by certain local authorities, in this case Buckinghamshire County Council who, under that Act, become the " administering " authority " who have to administer that fund.

[His Lordship read s. 35 and continued :] It is contended that I cannot decide this question because it is for the Minister. Mr. Williams answers that by saying it is not a question for the Minister because the authority concerned here are the rural district council ; that they have decided that the plaintiff is entitled as of right to superannuation payment; and that the only thing left is for the county council as administering authority to pay him. I should like to be able to accept that argument, but I do not think that I can. True, the words used in the Act are " the authority concerned," but the question is, who are the authority concerned ?

(1) Regulation 4 (2) : " Every " such employing authority shall " from time to time furnish the " appropriate administering authority with such information " as that authority may reasonably require for the purpose of " discharging their functions under " the Act in relation to any of " the contributory employees of " the employing authority or any " person claiming under him."

Mr. Simes answers Mr. Williams' argument by saying that the authority concerned are the authority who have to administer the fund; and I think that that is right. The authority who are to administer the fund have to see to its proper application; and, if a person who is in their opinion not entitled to be paid claims to be paid, the body who have the duty of paying must satisfy themselves, in the first instance, that he is the right person to be paid, and that he has the right to be paid. If they come to the conclusion that he has not the right to be paid, then the matter has to go to the Minister. I think that the question did arise here of the right of the employee to be paid. Mr. Simes has pointed out that s. 8, which prescribes the eligibility of any particular employee, does not confer any right or duty upon anybody to decide anything: it simply says that he has the right to receive an annual superannuation allowance if certain conditions are fulfilled; and counsel therefore argues that the authority who have to pay are the authority who must satisfy themselves that he has brought himself within s. 8. If he has not done that, the administering authority cannot pay him: they have the right and the duty to refuse to pay. If their decision is that he is not entitled to be paid, and that is challenged by the contributory employee, then the question arises between the administering authority and the employee, and that question must be decided by the Minister. For these reasons I come to the conclusion that this action fails.

Judgment for the defendants

Solicitors: *Timothy Hales; Sharpe, Pritchard & Co., for G. L. Bridger, Slough; Pyke, Franklin & Gould, for Guy R. Crouch, Aylesbury.*

REX *v.* MIDDLESEX QUARTER SESSIONS.
Ex parte DIRECTOR OF PUBLIC PROSECUTIONS.

1950
Apl. 4.

Lord Goddard C.J., Humphreys and Jones JJ.

Criminal law—Procedure—Offence triable summarily—Committal of prisoner to quarter sessions for sentence—Case not triable by quarter sessions on indictment—Committal invalid—Discharge of prisoner—Validity—Prevention of Corruption Act, 1906 (6 *Edw.* 7, *c.* 34), *ss.* 1, 2—*Criminal Justice Act,* 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 29, *sub-s.* 1; *s.* 3 (*a*).

Quarter sessions have no jurisdiction under sub-s. 3 of s. 29 of the Criminal Justice Act, 1948, to deal with an offender committed to them for sentence by justices under sub-s. 1 of that section if the case is not one which could have been tried before them on indictment.

The facts that an offence is triable summarily and that the prisoner can be committed to quarter sessions for sentence are not by themselves sufficient to justify justices in trying a case instead of committing it to assizes or quarter sessions. It is not a question of sentence only: justices should consider the gravity of the case in itself, and, if it is a grave case, commit the prisoner for trial accordingly.

Application for an order of mandamus.

On February 17, 1950, a defendant was charged before Wealdstone justices with an offence against s. 1 of the Prevention of Corruption Act, 1906, in that on January 11, 1950, he unlawfully and corruptly gave 80*l.* to a food executive officer, in order to induce him to refrain from advising a prosecution against the defendant's principal. After he had been convicted, the justices were informed of three previous convictions against him. They accordingly committed him to quarter sessions for sentence under s. 29, sub-ss. 1 and 3 (*a*) of the Criminal Justice Act, 1948, (1).

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(1) Criminal Justice Act, 1948, "s. 29, sub-s. 1: "Where .... a "person who is not less than "seventeen years of age is tried "summarily by a court of sum-"mary jurisdiction for an "indictable offence, and is "convicted by that court of "that offence, then if, on obtain-"ing information as to his "character and antecedents, the "court is of opinion that they are "such that greater punishment "should be inflicted in respect "of the offence than that court "has power to inflict, the court "may, in lieu of dealing with him "in any manner in which the "court has power to deal with "him, commit him in custody to "quarter sessions for sentence in "accordance with the following "provisions of this section."

Sub-section 3: "Where an

[Reported by Mrs. F. N. Bucher, Barrister-at-Law.]

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Rex v. Middlesex Quarter Sessions. *Ex parte* Director of Public Prosecutions.

Before quarter sessions on March 14, 1950, it was submitted for the defendant that they had no jurisdiction to impose a sentence under s. 29, since the offence of which the defendant had been convicted was one which, by virtue of s. 2, sub-s. 5 of the Prevention of Corruption Act, 1906, (1), quarter sessions had no jurisdiction to try on indictment. Quarter sessions accepted that submission and refused to impose any sentence. By order of the Home Office the defendant was then released from custody.

The Director of Public Prosecutions accordingly applied to the Divisional Court for an order of mandamus requiring quarter sessions to sentence the defendant in accordance with s. 29, sub-s. 3 of the Act of 1948.

Sir Hartley Shawcross A.-G., Christmas Humphreys and *F. H. Lawton* for the Director. The purpose of s. 29, sub-s. 1 of the Criminal Justice Act, 1948, is to enable justices to commit a person whom they have convicted summarily of an indictable offence to quarter sessions for sentence if it appears to them, when they have heard his record, that a heavier sentence ought to be imposed than that which they themselves have power to inflict. The sub-section applies to all cases of indictable offences tried summarily under s. 28, sub-s. 2 of the same Act and s. 24 of the Criminal Justice Act, 1925.

The sub-section creates a new statutory jurisdiction which is different from quarter sessions' jurisdiction to try indictable offences. The power to sentence is quite distinct from the jurisdiction on indictment which quarter sessions possess. For this offence they have no power to convict, but have power only to sentence.

" offender is so committed for " sentence as aforesaid . . . . " (*a*) the appeal committee or " court of quarter sessions shall " inquire into the circumstances " of the case, and shall have " power to deal with the offender " in any manner in which he " could be dealt with by a court " of quarter sessions before which " he had just been convicted of " the offence on indictment."

(1) Prevention of Corruption Act, 1906, s. 2, sub-s. 5: " A court " of quarter sessions shall not have " jurisdiction to inquire of, hear " and determine prosecutions on " indictments for offences under " this Act."

Note.—Similar provisions deprive quarter sessions of jurisdiction under, inter alia, the following statutes:—

Larceny Act, 1916, s. 38, sub-s. 1 (*b*).

Mental Deficiency Act, 1913, s. 56, sub-s. 4.

Official Secrets Act, 1911, s. 10, sub-s. 3.

Representation of the People Act, 1949, s. 146, sub-s. 1 (*a*).

All that s. 29, sub-s. 3 (*a*) means is that quarter sessions must assume that the person before them has been lawfully convicted before them on indictment, and must then proceed to exercise their powers of sentence. The purpose of the provision is to fix the date of conviction.

The intention of the legislature was that justices should have power to send a prisoner forward to quarter sessions for sentence in all cases where his character and antecedents demanded a heavier penalty than they themselves could impose.

T. F. Southall for the justices of quarter sessions. The case for the Crown amounts to the proposition that, by virtue of some general words in the Act of 1948, the special words in s. 2, sub-s. 5 of the Prevention of Corruption Act, 1906, may be disregarded. But it requires express terms in a later general Act to derogate from special words in an earlier statute. No matter what the intention of the legislature may have been, if the words used in a statute are not apt to carry out that intention, the court will not assume that they are: *Ayrshire Employers Mutual Insurance Association, Ld.* v. *Inland Revenue Commissioners* (1). The words of s. 29, sub-s. 3 (*a*) are clear, and define quarter sessions' powers: if the offender could not be tried by quarter sessions on indictment, he cannot be sentenced by them on committal under s. 29, sub-s. 1.

James Burge for the defendant. This is not an accident of legislation. When the Act of 1948 was drafted, all four types of tribunal dealing with criminal matters were preserved with their different powers. The language of s. 29, sub-s. 1 is perfectly clear: the words "the following provisions of this "section" include sub-s. 3 (*a*), and "the" offence in sub-s. 3 (*a*) must mean "the same offence."

Sir Hartley Shawcross A.-G. replied.

LORD GODDARD C.J. The history of s. 29 of the Criminal Justice Act, 1948, is now well known. Before the passing of that Act, there had been two cases in the Court of Criminal Appeal, *Rex.* v. *Sheridan* (2), and *Rex.* v. *Grant* (3), in each of which a man was brought before the justices and elected to be dealt

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(1) 1946 S. C. (H. L.) 1. 27 T. C. 33.

(2) [1937] 1 K. B. 223.

(3) (1936) 26 Cr. App. R. 8.

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with summarily for an indictable offence. The justices consented to deal with him summarily, heard the evidence and convicted him. They then heard that his record was a very bad one, and they did not consider that the maximum of six months' imprisonment which they could give him was a sufficient punishment. They accordingly committed him for trial at the quarter sessions. On his being committed, the plea of autrefois convict was put in, and it was held by the Court of Criminal Appeal that that was good, because there had been a conviction although petty sessions had not proceeded to sentence.

Accordingly, when the Act of 1948 was passed, an entirely new procedure was set up, it being provided that, where an indictable offence was dealt with summarily, the justices, if they convicted and then heard that the prisoner's record was such that they did not think their powers were adequate to give proper punishment, could then send him forward to quarter sessions for sentence.

It is s. 29, sub-s. 1 of the Act of 1948 which has given rise to the difficulty in this case. [His Lordship read the subsection and sub-s. 3, and continued :]

Offences under the Act of 1906 may be dealt with either on indictment or on summary conviction, and two different penalties are prescribed. Section 2, sub-s. 1 provides that a prosecution for an offence under the Act can only be instituted with the consent of the Attorney-General. By s. 2, sub-s. 5 : "A court of quarter sessions shall not have "jurisdiction to inquire of, hear and determine prosecutions "on indictments for offences under this Act." By sub-s. 6 : "Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions."

It is a somewhat curious state of affairs that there should be an offence created by statute which can be dealt with by justices in petty sessions sitting as a court of summary jurisdiction, but may not be dealt with, on committal for trial, by justices sitting in quarter sessions. Nevertheless, quarter sessions have power to hear an appeal from justices in petty sessions, but they have no power to try the prisoner : they have no power "to inquire of, hear and determine prosecutions "on indictments for offences under this Act." The justices in this case, having heard of the defendant's record, sent him forward, purporting to act under s. 29, to quarter sessions for sentence; but quarter sessions decided that they had no power to sentence him.

In the opinion of the court, they were right. What s. 29, sub-s. 3 (*a*) says is that quarter sessions " shall have power to " deal with the offender in any manner in which he could be " dealt with by a court of quarter sessions before which he " had just been convicted of the offence on indictment "; but he could not be dealt with by quarter sessions under that section, because they have power to deal with the offender only in the way in which they could deal with him if he had just been convicted on indictment before them. As this defendant could not have been tried before them, and could not have been convicted on indictment before them, it appears to the court that s. 29, sub-s. 3 (*a*) deprives quarter sessions of power to deal with this defendant. It is no doubt a casus omissus in the Act. It may be that Parliament intended that any case that could be dealt with summarily could be dealt with by a court of quarter sessions under this section. The difficulty is that they have not said so. They have expressly limited the jurisdiction as I have described by the words which they have used; and, as this is an entirely statutory procedure, it is necessary that the statutory provisions should be strictly complied with.

We have been given an interesting list by the Attorney-General of the other cases in which this same point may arise. It may therefore be that, if the attention of the legislature is called to the difficulty which has arisen, they will see fit to put the matter right.

I would add one observation on another matter. On the many occasions on which I have given addresses to magistrates, I have brought it to their attention that the fact that they have power to deal with a case summarily is by no means a reason why they necessarily should do so. It is not only a question of sentence: many cases brought before justices can be dealt with by them but are very grave and ought to be sent for trial. It may be that there are matters of mitigation, as they may think; and it may turn out that the court to which the case is committed in the end only passes a nominal sentence, or binds the prisoner over. That is not the point: serious cases ought to be dealt with by the superior courts. I hope that because Parliament has introduced this new procedure prosecutors will not think that, for the sake of saving trouble, it will be sufficient for the justices to deal with the

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case and then send the prisoner forward for sentence. It is not only a question of sentence: the point is that grave cases ought to be dealt with by superior courts. Here a defendant was found guilty by justices of what appears to be a very serious offence, that of offering a food executive officer a bribe, as much as 80*l.* Why the Director or his representative agreed to have the case dealt with summarily, I do not know. I say, without hesitation, that it is a case which ought to have gone for trial. I hope that notice will be taken by justices of the fact that, when serious cases are brought before them, it is not enough to say, "we have power to deal with the case, "therefore we will deal with it."

The application will be dismissed.

HUMPHREYS J. As far as I am concerned, that is the judgment of the court.

JONES J. I agree.

Application dismissed.

Solicitors: *Director of Public Prosecutions; C. W. Radcliffe; Lucien Fior.*

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Emergency legislation—Compensation payable to "owner"—Requisitioning—Whether landlord or tenant entitled—Determination of rack rent—Public Health Act, 1936 (26 *Geo.* 5, & 1 *Edw.* 8, *c.* 49), *s.* 343, *sub-s.* 1—*Compensation (Defence) Act,* 1939 (2 & 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*b*); *s.* 2, *sub-s.* 3; *s.* 7; *s.* 11; *s.* 17, *sub-s.* 1.

Section 2, sub-s. 1 (*b*) of the Compensation (Defence) Act, 1939, provides for compensation for damage occurring to land under requisition, and by s. 2, sub-s. 3 the compensation shall accrue due at the date of derequisitioning and "be paid to the person "who is then the owner of the land." By s. 17, sub-s. 1, "owner" is defined as "the person who is receiving the rackrent of the "land . . . . or who would so receive it if the land were let at "a rackrent," which expression is to have the meaning which it bears in the Public Health Act, 1936, s. 343, sub-s. 1 of which defines it as "a rent which is not less than two-thirds of the rent "at which the property might reasonably be expected to let "from year to year" subject to certain adjustments.

By s. 11: "No claim for any compensation under this Act "shall be entertained unless notice of the claim has . . . . been "given to the prescribed authority within . . . . six months . . . "beginning . . . . with the date on which the compensation "accrued due . . . ."

It is not necessary to a landlord's right to recover compensation under the Act as owner that the claim as required by s. 11 should have been put forward by him or on his behalf: it is sufficient that the tenant, or someone else properly claiming to be interested in the property, should have done so, even though the compensation turns out to be payable not to the person making the claim but to the landlord.

Whether the rent which the landlord is receiving is a rackrent, so as to qualify him, as owner, to receive compensation under the Act, is to be determined by reference to circumstances existing when the lease was granted and not to those existing at the date when the requisitioning of the premises comes to an end.

In considering whether the rent which the landlord is receiving is a rackrent as defined, the court must take the premises as they are and, in particular, as subject to all the restrictive covenants imposed by the lease.

Decision of Hilbery J. affirmed.

INTERPLEADER issue.

By a lease dated July 30, 1934, the Paddington Estate Trustees, the plaintiffs in the issue, hereafter called the landlords, let No. 6 Somers Crescent, Paddington, to Brigadier-General Hardress-Lloyd for a term ending on December 25, 1947, at a rent of 150*l*. a year. It appeared from the landlords' records that Brigadier-General Hardress-Lloyd had, before the granting of that lease, effected some improvements to the property, and that, in consideration of those improvements and of the surrender of his previous lease, the rent was fixed at 150*l*., although the rackrent at the date of the lease was 180*l*. The tenant covenanted to repair, and by cl. 2 (1) covenanted to use the house as and for a single private dwelling house only.

The house was requisitioned on March 30, 1944. In November, 1947, the defendant began negotiations for the purchase of the unexpired portion of the term. On February 28, 1948, the house was derequisitioned, and on March 12, 1948 the residue of the term was assigned to the defendant (hereafter called the tenant) with the right to receive the compensation

[Reported by Mrs. F. W. BUCHER, Barrister-at-Law.]

payable in respect of the requisition under the Compensation (Defence) Act, 1939.

On March 18, 1948, the tenant put in a claim complying with s. 11 of the Act of 1939 in the prescribed form to the London County Council, claiming compensation under s. 2, sub-s. 1 (*b*) of the Compensation (Defence) Act, 1939, (1). The amount of the compensation was agreed at 1,070*l*., with a further sum of 55*l*. 7*s*. 9*d*. for surveyors' fees which the tenant had paid. The solicitor to the London County Council required to see the lease before paying the compensation.

(1) Compensation (Defence) Act, 1939, s. 2, sub-s. 1: "Compensation payable under this "Act in respect of the taking "possession of any land shall be "the aggregate of the following "sums, that is to say . . . . "(*b*) a sum equal to the cost of "making good any damage to "the land which may have "occurred during the period for "which possession thereof is so "retained (except in so far as "the damage has been made "good during that period by a "person acting on behalf of His "Majesty), no account being "taken of fair wear and tear or "of damage caused by war "operations. , . . . "

Sub-section 3: "Any compensation under paragraph (*b*) "of sub-s. (1) of this section "shall accrue due at the end "of the period for which possession "of the land is retained in the "exercise of emergency powers, "and shall be paid to the person "who is then the owner of the "land."

Section 11: "No claim for any "compensation under this Act "shall be entertained unless "notice of the claim has, in "such form and manner as may "be prescribed, been given to the "prescribed authority within the "period of six months, or such "longer period as the Treasury "may, either generally or in "relation to any particular claim "or class of claims, allow, beginning "in either case with the "date on which the compensation "accrues due or the date of the "passing of this Act, whichever "is the later."

Section 17, sub-s. 1: ". . . . "'owner' means—(*a*) in relation "to land, the person who is "receiving the rackrent of the land ". . . . or who would so receive "the rackrent of the land if it were "let at a rackrent . . . . and in "this definition the expression "'rackrent' has the same meaning "as in the Public Health Act, "1936."

The Public Health Act, 1936, s. 343, sub-s. 1: ". . . . 'rackrent' in relation "to any property means a rent "which is not less than two-thirds "of the rent at which "the property might reasonably "be expected to let from year to "year, free from all usual tenant's "rates and taxes, and tithe rent-charge "(if any), and deducting "therefrom the probable average "annual cost of the repairs, "insurance and other expenses "(if any) necessary to maintain "the same in a state to command "such rent."

When it was produced, he took the point that the tenant was not the owner within s. 2, sub-s. 3 of the Compensation (Defence) Act, 1939, and that the compensation could only be paid to the tenant with the landlord's consent. The tenant on January 31, 1949, issued a writ against the London County Council claiming payment of the agreed compensation moneys. The council interpleaded, and on March 9, 1949, an order was made directing payment of the sum of 1,070*l.* and interest into court, that all proceedings in the action should be stayed and that an interpleader issue as to the right to receive the compensation should be tried, the landlords being made the plaintiffs in those proceedings. No question arose on 55*l.* 7*s.* 9*d.* payable for surveyors' fees, which was duly paid to the tenant.

Sir Shirley Worthington-Evans for the landlords.

Astell Burt for the tenant.

The arguments of counsel sufficiently appear from the judgment.

Cur. adv. vult.

March 14. HILBERY J. read the following judgment, in which he stated the facts and continued :—The question to be determined between the landlords and the tenant is which of them is the "owner" of No. 6 Somers Crescent as defined by the Compensation (Defence) Act, 1939, since that Act expressly provides that compensation under s. 2, sub-s. 1 (*b*) must be paid to the "owner" as defined by that Act, and gives no authority for payment of it to anyone else.

That being the question, while the landlords have been made plaintiffs in the issue by the order of the master, the tenant is as much a claimant to the compensation money in question as are the landlords. Both are claimants as against the London County Council, the authority by whom the money is payable under the Act, and each of them asserts against the other that he is the party entitled to be paid as "the "owner" within the definition given in the Act. To urge, therefore, as counsel for the tenant did, that the landlords had any greater burden of proof upon them than he, is, in my view, fallacious. The tenant is not resisting a claim upon him made by the landlords, and the plaintiffs are not making a claim upon him. He, in his turn, is not claiming upon them. Each of the parties is a party asserting that he is "the owner" as defined by the Act in question, and has undertaken the same burden of proof. Each is a party asserting an affirmative case. It does not matter, therefore, in which order the parties' claims are considered. For convenience, I shall begin with the case sought to be made by the tenant.

His first contention was that this court had no jurisdiction to try the issue, inasmuch as, by s. 7 of the Act in question, the question fell to be determined by the tribunal constituted under the Act. The answer to this is to be found in the wording of s. 7 of the Act. That section reads as follows: "Any dispute as to whether any compensation is payable "under this Act, or as to the amount of any compensation "so payable, shall, in default of agreement, be referred to, "and determined by, the appropriate tribunal constituted "under the following provisions of this Act, and the decision "of that tribunal shall be final." What that tribunal has jurisdiction to determine is any dispute about whether any compensation is payable at all, or about the amount of any compensation which is payable. This issue before me does not raise either of those questions It never has been asserted that compensation was not payable, and there has been no failure to agree the amount of the compensation which is payable. The question who is the owner, as defined by the Act, to whom payment must be made, is not a question over which the tribunal constituted by the Act is given jurisdiction by the Act. The objection to the jurisdiction of this court is groundless.

The tenant's counsel's next contention was that the landlords' claim in this issue was a claim to compensation, and was not made within the time or in the form prescribed by s. 11 of the Act. He relied on the words of s. 11 of the Act.

The answer to this seems to me to be that s. 11 is intended to apply to the claim to compensation made under s. 2. That claim was already disposed of and the amount of it settled by agreement before this issue was directed to be tried by this court. The landlords are not claiming compensation under s. 2, but are claiming to be the party to whom the amount of compensation, as quantified when the claim for compensation was made, has to be paid according to the express direction given in the Act. That is a claim which is quite distinct from the claim for compensation to be made in the form and on the form prescribed by the Act. That contention, therefore, likewise fails.

Next, it was said that the tenant had agreed the amount in question as the compensation payable by the authority, that that amount was payable by the authority by virtue of that agreement, and that, by claiming this compensation, the landlords were seeking to enforce a contract to which they were strangers. The answer seems obvious. In the first place, when the amount of the compensation to which the issue relates was agreed with the tenant, no contract was made with anyone to pay that amount. The authority were under a statutory duty, not a contractual obligation, to pay that compensation. Neither of the parties to this issue is claiming under a contract. Each is claiming that he is the party to be paid, because he is the " owner," as defined by the statute, of the property in question in respect of which the amount of compensation payable has been agreed. Neither is claiming the compensation, because the amount payable has been agreed. Before either party to the issue can succeed, he has to establish something which is outside and quite distinct from the agreement about the amount of the compensation, namely, that he is the " owner " as defined in the statute, and is therefore the person to whom alone, as the statute expressly says, the money must be paid. Again the tenant has failed to make good his point.

The next contention urged by counsel for the tenant was that, having regard to s. 12, sub-s. 2 of the Compensation (Defence) Act, 1939, the amount of compensation which could be payable to the landlords must either be nil or very much less than the amount of compensation which the tenant had claimed and agreed with the authority liable to pay compensation. Section 12, sub-s. 2, provides that " No compensation " shall, by virtue of this Act, be payable to any person in " respect of any loss of, or damage to, property, if and so far " as that person has become entitled, apart from the provisions " of this Act, to recover any sum by way of damages " or indemnity in respect of that loss or damage or is, at the " time of the occurrence of the loss or damage, required under " any contract with the Crown to be insured in respect thereof."

It was argued that, since the lease assigned to the tenant contained full repairing covenants, without exception for fair wear and tear, the landlords had become entitled, apart from the Act, to recover from the tenant either all or a large part of the damage to the premises, for which the compensation in question was payable under the Act. It was proved that the landlords had served a notice of dilapidations since the present dispute arose. The point seems to be fully answered by ss. 1, 2 and 3 of the Landlord and Tenant (Requisitioned Land) Act, 1944.

Section 1, sub-s. 1, provides: "Where, in the exercise "of emergency powers, possession of any land comprised in "a lease is taken on behalf of His Majesty, then, during the "period while possession so taken is retained, no remedy for "breach of any repairing covenant contained in the lease "shall be enforced, whether by action or otherwise, in respect "of any damage to the land occurring during that period; "and if the lease determines while possession of the land is so "retained, or if upon possession of the land being given up, "compensation in respect of the taking of possession thereof "becomes payable for any such damage to the person entitled "to the benefit of the covenant, no remedy for breach of the "covenant shall at any time be enforced as aforesaid in respect "of that damage." By sub-s. 2: "The provisions of this "section shall be deemed to have had effect as from August 24, "1939, and any proceedings for breach of a repairing "covenant pending at the commencement of this Act "shall, so far as they relate to any such damage as "aforesaid, be discontinued upon such terms as the court "thinks just."

Section 2, sub-s. 1: "Where possession of any such land "taken as aforesaid at any time after August 24, 1939, is or "has at any time since that date been given up during the "currency of the lease, and compensation in respect of the "taking possession thereof becomes or has become payable "for any such damage as aforesaid to any person other than "the tenant, then if the tenant incurs expenditure in making "good any of that damage, he may recover from that person "an amount equal to the expenditure so incurred, not exceeding so much of the compensation payable to that person "as may be agreed by the tenant and that person or, in "default of agreement, as may be determined by the court, "to be payable in respect of that damage."

By s. 3, sub-s. 2, of the Act of 1944: "It is hereby declared "that the provisions of s. 12, sub-s. 2, of the Compensation "(Defence) Act, 1939 (which provides that compensation "for damage shall not be paid by virtue of that Act to a person "entitled, apart from that Act, to recover any sum by way "of damages or indemnity in respect of that damage), do not "preclude the recovery by any person of compensation under "that Act for damage to land of which possession is taken "on behalf of His Majesty by reason only that that person "is entitled to the benefit of a repairing covenant which "relates to that damage." In my view, those sections afford the complete answer to this point, and I refrain from discussing it further lest I should be guilty of labouring the obvious.

Lastly, it was argued on behalf of the tenant that the question was who was the "owner" as defined by the Act at the date of the derequisitioning, as it was called, of the premises, and that, since "owner" was defined by the Act as the person receiving the rackrent (as defined) of the land or who would so receive the rackrent if it were let at a rackrent, the tenant was the "owner" as defined by the statute because the premises at the date of the derequisitioning, namely, February 28, 1948, were not let by the landlords by the existing lease at a rent which was the rackrent at that date, the rackrent then, it was contended, being much higher than that reserved by the lease. It was argued that the tenant, as assignee of the term created by the existing lease, was the person who in those circumstances would be entitled to receive the rackrent if the premises were then let at a rackrent.

In support of these last contentions, evidence was called to establish, if possible, (*a*) that on a new letting on February 28, 1948, for single occupation, the rent obtainable would have been very much higher than the 150*l*. a year reserved by the existing lease. The evidence called by the tenant failed to satisfy me of this as a matter of fact; I prefer the evidence called by the landlords, and, relying on it, decide this point against the tenant. Then, (*b*) that the premises would probably be taken for conversion into flats or tenements which could be let at such rents as would return to the assignee of the lease a net rent greatly in excess of 150*l*. a year. The evidence on both sides on these two propositions was thoroughly, indeed elaborately, examined and discussed before me.

After carefully considering both the evidence and the arguments, I am satisfied that neither of the propositions has been made out. I have said what I decide about contention (*a*). With regard to contention (*b*), after obtaining the assignment of the remainder of the term created by the lease of No. 6, the tenant did not obtain a licence from the landlords to disregard the term of the lease which made the letting one for single occupation only. I am satisfied, regarding the matter as a commercial venture in conversion and subletting, that a business man who calculated in detail the costs in which the enterprise would involve him (a thing which the tenant made no attempt to do) would not have been willing to take the premises, with the burden of full repairing covenants and insurance, at more than about 150*l*. a year.

So far as this court is concerned, that concludes this matter on the facts against the tenant's contention (*b*); but this contention, which I have called (*b*), depends primarily upon a construction of the Act of 1939 which in my view is based on a fallacy. Section 2, sub-s. 3, enacts two things: firstly, that the compensation payable under para. (*b*) of sub-s. 1, which is the compensation the subject of this dispute, accrues due at the end of the period of the requisition; and, secondly, that this compensation so due must be paid to the person who is then the owner, that is, the owner at the date when the requisitioning authority gives up possession of the premises.

In s. 17 the definition section, "owner" is defined as "the "person who is receiving the rackrent of the land," or, and it is important to notice that this is expressed as an alternative, the person "who would so receive the rackrent of the "land if it were let at a rackrent." It was argued, as the basis of this contention of the tenant, that, unless the landlords established that the rent which they were entitled to receive under the existing lease was at least equal to the rackrent, as defined, at which the premises would have let on February 28, 1948, they were not persons receiving the rackrent. It was said that they had not proved this, and that the alternative came into operation, with the result that the tenant was the person who would so receive the rackrent if it were then let at a rackrent.

I do not read the definition and s. 2, sub-s. 3 in this way. The wording of the definition does not seem to me to require it, or, indeed, to be in harmony with it. The definition, read with s. 2, sub-s. 3, does not begin by saying that the owner who is to be paid must be the person who, at the date when the requisitioning authority gives up possession, is receiving the "then" rackrent. What is said is that the compensation is to be paid to the owner of the property, and that person is the owner for this purpose, who, at that

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date, is receiving the rackrent. To stress the article "the," and to argue that it is here used before the word "rackrent" in contradistinction to the article "a," and to build upon this a contention that this part of the definition can therefore only be satisfied by a person who shows that he was receiving what would have been the rackrent on a letting on the date when the premises were given up by the requisitioning authority, is to strain words, and to make what is called definition something less definitive than it is, and little more than a key to an inquiry in almost every case.

The simple and obvious intention of these provisions is that the owner shall receive the compensation. For that purpose, the owner is the person receiving the rackrent. For a person to be in receipt of the rackrent at the date when the compensation is payable, the premises must already at that date be let. In other words, there must have been a prior letting under which the rackrent is being received. If there is such a letting at a rackrent, not at a nominal rent or a ground rent, then the owner is the person then receiving that rent.

It is not denied that the lease of the premises created a letting at what was the rackrent at the date of the lease. In my opinion, if that was the rackrent of the premises then, and the landlords were the persons receiving that rackrent at the date when the requisitioning authority gave up possession, they satisfy the first part of the definition, and there is no room for the alternative. There was an owner, in this case the landlords, receiving rackrent as defined.

In addition, I think that the wording of the alternative shows that all that is required to satisfy the first part of the definition is a letting at "a" rackrent, and a person receiving that rackrent. The alternative to a person who is receiving the rackrent of the land is a person "who would so receive "the rackrent of the land if it were let at a rackrent," not, be it observed, if it were let at "the rackrent."

To summarize my conclusions, I would say that a person who, at the designated date, is receiving the rackrent must be so receiving it under the terms of a letting prior to that date. If that prior letting was at what was, at the date of the letting, the rackrent, the person who is receiving that rent at the date when the compensation becomes payable is the "owner" as defined by the first part of the definition of "owner" given in s. 17 of the Act of 1939.

Finally, the fact that the tenant was the person who made the claim for this compensation, and the fact that the authority liable to pay it agreed the amount of the compensation with him, do not affect the only question which I have to decide, namely, to which of the parties to the issue are the authority, the London County Council, required by the statute to pay that compensation? The Compensation (Defence) Act, 1939, is silent about who is to have the right to claim the compensation, but expressly provides who alone is to be the recipient. There is nothing in the Act to which the tenant can point which gives him, as the claimant, the right to be the recipient.

There must therefore be judgment on the interpleader issue for the landlords, and the tenant must pay the costs of the issue and of the London County Council down to the date of the stay.

The tenant appealed.

Astell Burt for the tenant. There are two grounds on which the tenant contends that the landlords are not entitled to the compensation payable by the requisitioning authority. The first is that they did not make a valid claim under the Compensation (Defence) Act, 1939, which by virtue of s. 11 must be made within six months after the requisitioned premises being given up. The rules provide that every notice of claim must be made by the claimant or by someone acting on his behalf. The tenant's claim was not made on behalf of anyone but himself, as appears from the correspondence. The solicitor to the London County Council said that the tenant must obtain the landlord's consent as his lessors to his receiving the compensation. This they refused on the ground that he had not become the tenant by assignment when the requisitioning was made.

[SOMERVELL L.J. In these cases relating to land it can be very seldom that only one person is interested.]

Section 2, sub-s. 3 of the Act says that compensation is to be paid to the "owner" of the land, but the Landlord and Tenant (Requisitioned Land) Act, 1944, has made provision for payment to a tenant who has made good the damage caused through requisitioning. The first point here is that, the claim having been made by the tenant only, no other person can avail himself of it.

The second ground for contending that the landlords cannot claim is that they are not owners within the definition of "owner" in s. 17 of the Act of 1939 since they are not the persons in receipt of the "rackrent." It is provided by s. 17 that "rackrent" has the meaning given to it by the Public Health Act, 1936. Section 343, sub-s. 1 of the Act of 1936 provides that "rackrent" means a rent which is not less than two-thirds of the rent at which the property might reasonably be expected to be let from year to year after deducting therefrom the probable cost of repairs. A person letting for 23 years to a tenant, with an obligation on the tenant to do any structural alterations or repairs, is not in receipt of the "rackrent" in view of the obligation cast on the tenant. The court has to ascertain the hypothetical rent laid down by the Public Health Act, 1936. The landlords then were in receipt of a rent of 150*l.*, but they had shortly before the granting of the lease received a rent of 180*l.* Hilbery J., assumed that the tenant conceded that the landlords were in receipt of the rackrent. That is not so. Whether they were in receipt of the rackrent as defined by the Act of 1936 has to be ascertained as at the date of the derequisitioning of the property. Two matters must be taken into consideration: when the premises were let in 1934 they were let for use as a private dwelling-house only. That restriction has a tremendous effect on the value of the premises. To determine the "rackrent" of these premises the court must ascertain what rent the hypothetical tenant would pay for the premises if they were let without any restriction as to use. The rent may have been a rackrent at the date of the lease, but it was not a rackrent at the date of derequisition. It is at the latter date that the court must determine who is in receipt of or entitled to the rackrent: see *Driscoll* v. *Battersea Borough Council* (1). The evidence shows that if the premises were now sublet by the tenant he could obtain a greatly increased rent. It is submitted that the landlords are not the "owners" and accordingly not entitled to the compensation.

Sir Shirley Worthington-Evans, for the landlords, was not called on to argue.

SOMERVELL L.J., asked by EVERSHED M.R., to give the first judgment, stated the facts, and continued:—I would refer, as did Hilbery J., to the Landlord and Tenant (Requisitioned Land) Act, 1944. It would appear to have

(1) [1903] 1 K. B. 881.

been thought in 1944, and it can be seen that there is reason for it, that, if the Act of 1939 had been left as it was, tenants might not obtain the compensation for damage done to which, having regard to the terms of their lease, it might be thought they were entitled. If, for instance, the damage were done in respect of repairs which the tenant, paying a rackrent under his lease, was liable to do, could the owner, the landlord, recover the compensation and insist on the tenant's carrying out his covenant ? This would have been obviously unjust. A tenant himself might, when the requisitioning was over and he went back, find the premises in a very bad state, and he might himself carry out, in order to make them habitable, repairs for which, on investigation, it turned out that the requisitioning authorities were liable. It would seem wrong that in such a case the tenant should have no right to be reimbursed and that the landlord should receive and keep the compensation. The law might perhaps have implied some form of trust or quasi-trust obligation on the landlord in order to safeguard the tenant's rights.

The matter in fact engaged the attention of Parliament, however, and was regulated by the first two sections of the Act of 1944. Section 1 modifies the obligations under a repairing covenant in respect of damage which occurs during a requisition in cases where the landlord has received the compensation, so that he does not in effect obtain relief twice over. Section 2 gives the tenant, who has made good damage in respect of which compensation is paid to the landlord, a right of reimbursement by the landlord in respect of what he has spent on the repairs. Those provisions seem to ensure satisfactory protection to, and to confer satisfactory rights on, tenants in this matter.

The requisition having ceased on February 28, 1948, the tenant on March 18, 1948, made a claim in the prescribed form. Therefore on the face of it s. 11 of the Act of 1939 was satisfied. The actual figure was agreed fairly rapidly: there was a sum in respect of surveyor's fees (on which no point arises) and a sum in respect of damage. The district surveyor made a report and the payment was authorized. Then the solicitor to the London County Council quite rightly took the point that the Act of 1939 made the amount payable to the "owner," who is the person entitled to receive the rackrent. He asked the tenant for his title, and the matter was gone into. Then the authorities took the view that the landlords appeared to be the "owners" under the Act, and that therefore their consent to the payment to the tenant should be obtained.

The interpleader order reads as follows: "Whereas the "above-named the trustees of the Paddington Estate affirm "and the above-named Francis Howard Collier denies that the "fund of 1,128*l.* 18*s.* 7*d.* now in court to the credit of this "action . . . . and for the recovery whereof the said Francis "Howard Collier lately instituted an action against the London "County Council is payable to the said the Trustees of the "Paddington Estate and not to the said Francis Collier and "that the costs of the London County Council directed to be "deducted as in the master's said order are payable by the "said Francis Howard Collier and not by the said the Trustees "of the Paddington Estate. And it has been ordered by the "Order of Master Horridge dated March 9, 1949, that the said "issue shall be tried at Middlesex by a judge alone and be "entered in the long non-jury list."

The first point taken by Mr. Astell Burt is that the landlords can make no claim now because they made no claim on the prescribed or any form within the six months provided for by s. 11 of the Act of 1939. He says that the matter must be looked at as if they had sought to appear before a tribunal; that, not having put in a claim within six months, they would be non-suited in limine; that they cannot rely on the tenant's claim as it was not made on their behalf, they had no knowledge of it, the tenant did not purport to act as their agent, and, indeed, as the subsequent proceedings show, that was the last position in which he intended to put himself; and that therefore the landlords' claim cannot succeed.

On that, Hilbery J., said: "The defendant's counsel's "next contention was that the landlords' claim in this issue "was a claim to compensation, and was not made within the "time or in the form prescribed by the Act. He relied on "the words of s. 11 of the Act . . . . The answer seems to "me to be that s. 11 is intended to apply to the claim to "compensation made under s. 2. That claim was already "disposed of and the amount of it settled by agreement "before this issue was directed to be tried by this court. "The landlords are not claiming compensation under s. 2, "but are claiming to be the party to whom the amount of "compensation, as quantified when the claim for compensation "was made, has to be paid according to the express direction "given in the Act. That is a claim which is quite distinct "from the claim for compensation to be made in the form "and on the form prescribed by the Act. That contention, "therefore, likewise fails." I agree with that: it seems to me in accordance not only with the wording of the Act, but with common sense. The object of a short period of limitation is clearly that, if a claim for compensation for damage under s. 2 is going to be made, it is only right and proper that it should be made promptly in order that the requisitioning authorities shall have a chance of seeing what it is said has been damaged. If there were delay, it might be very difficult to prove what damage had been done during the requisitioning period and what damage had been done since. The condition as to limitation was fulfilled in the present circumstances when the claim was put forward by the tenant; and it seems to me that s. 11 is satisfied if a claim is put forward by a tenant or by someone properly interested, assuming the existence of someone other than a tenant or a landlord, and the matter is properly investigated, the damage considered, and the amount quantified. The fact that the Act provides that the compensation is to be paid to the "owner" does not seem to me to affect the matter. The claim had been made, the compensation had been assessed, and a person came forward and claimed to be the owner. There might be doubt in some cases who the owner was. Provided that the claim is properly put forward, an owner is not barred by s. 11 because he did not himself in his own name put forward his claim within the prescribed six months.

It was pointed out by the Master of the Rolls during the argument that, even if it might be held to be a good point in certain cases, it would be very difficult to regard it as such here when the requisitioning authority have paid the money into court. That being so, it must be for the court to decide, there being this sum of compensation due under s. 2, which is the party to whom it should be paid. I also think that the sections of the Act of 1944 to which I have referred give a tenant a locus standi to put forward the claim. Therefore, I think that that point fails.

The definition of "owner" is in s. 17, sub-s. 1 of the Act of 1939, which goes on to say, "and in this definition the "expression 'rackrent' has the same meaning as in the "Public Health Act, 1936." The definition in s. 343 of that Act seems to me to proceed on this basis: first assume a figure on a lease from year to year under which the landlord would do the structural repairs, that is, the repairs necessary to maintain the property in a state to command the rent. Having arrived at that figure, deduct from it the average annual cost of the repairs, insurance and other expenses necessary to maintain the premises in a state to command the rent. The figure thus arrived at would be the rent to be expected if the parties were at arm's length under a lease from year to year, the tenant assuming the obligations of a full repairing covenant. The rent is a rackrent if it is two-thirds or more of the figure so arrived at. That, as it seems to me, is the meaning of the definition.

Mr. Astell Burt submits that the landlords did not establish that they, as at the date of derequisitioning, were persons receiving the rackrent. On that issue there are two questions, and the trial judge determined both. The first is whether it is sufficient that the rent payable under the lease granted in 1934 then amounted to a rackrent within the definition in s. 343 of the Public Health Act, 1936, account being taken of the property and circumstances at that time when the lease was granted; or whether in each case it has to be determined whether the rent is within the definition having regard to the circumstances as they existed at the date when the requisition ended. Hilbery J., decided that it was sufficient if the rent was within the definition at the time when the lease was granted, and I agree with him.

The second question arises out of cl. 2 (1) of the lease, whereby the tenant covenanted that he "will not use or permit "to be used the demised premises or any part thereof for any "illegal or immoral purpose nor for or as a hospital or charitable "institution or for the teaching of singing or music of "any sort nor for any trade business manufacture or profession whatsoever. But will keep and use the demised "messuage as and for a single private dwelling-house in one "occupation only with any area yard or ground therewith "demised as and for private ground in connexion with the "demised messuage only." The question is whether, in considering whether a rent is a rackrent, the restrictive covenants in the lease are to be taken into account. It was suggested that we should take into consideration what rent would be offered by somebody who was prepared to spend hundreds or thousands of pounds in converting the premises into flats. That, I think, must clearly be ruled out, because the definition in s. 343 is based on a lease from year to year. There might be a lease in all respects similar to this, except that the lessee could use the house for a trade, business, or profession, or teaching music. It may be that, with those restrictions removed, the house would have fetched a higher rent, either in 1934 or in 1948, than that in fact paid. In my opinion, when, for the purposes of this definition, the court has to consider whether a rent is a rackrent, it must have regard to the restrictive covenants in the lease, and to the premises, as they are. It would be absurd if in an obviously residential neighbourhood, with a rent obviously a rackrent for the premises as a private residence, the court were compelled to say that it was not a rackrent because a much larger rent might have been obtained if the house had been let with power to use it as a shop.

I do not think that the evidence called to show what might be obtained for this house apart from the restrictive covenant in the lease has any relevance to the present issue. [His Lordship referred to the evidence on this question, and continued :] Having read the evidence I think that the landlords have established that at the date when the requisition ceased they were the persons receiving the rackrent. Mr. Astell Burt wanted to treat them as under a burden of proof which they had not satisfied. There are some cases in which the conception of burden of proof is helpful, but in a case like this, where both sides have called evidence, I think that the court has to make up its mind on all the evidence whether the landlords were receiving a rackrent within the definition or were not. I have come to the conclusion, without hesitation, that they were receiving a rackrent within the definition. Therefore, the landlords make out their case, the appeal should be dismissed, and there should be an order for payment out to them of the sum in court.

ASQUITH L.J. I agree. The appeal raises two questions : first, was notice to treat given within the time-limit and in accordance with the terms of s. 11 of the Compensation (Defence) Act, 1939? Secondly, if s. 11 was complied with, who was the "owner" to whom under s. 2, sub-s. 3 the compensation fell to be paid? On the second of these issues I do not wish to add anything to what my Lord has said. On the first I venture to add two or three sentences.

The tenant's argument under this head, as I understand it, is that, even if the landlords were the "owners" at the material time, the notice of claim which s. 11 requires to be given within six months is a notice which has to be given by them or on their behalf, and that no such notice was in fact given by them within those time limits, or at all, on their behalf. It is indeed abundantly plain that notice was given within six months by the tenant; that this was the only notice given; and that he gave it on his own behalf only. Mr. Astell Burt's submission under this head would have been difficult to resist if s. 11 had provided that the notice must be given by the owner or the person who ultimately turns out to be the owner. But this Act nowhere does this: it nowhere identifies the claimant under s. 11 with the owner, and I cannot see that any such identification must be implied. There is nothing absurd in a provision that due notice of a claim is to be given by X., so that its merits and quantum can be ascertained, but that, when its merits have been ascertained and compensation has been assessed, the compensation shall be paid to such person as turns out to be entitled to it, even though that person is not X. but Y. Indeed, this is what I think the Act says. The result in some cases might indeed be that Y. reaps the benefit of an act done neither by him nor on his behalf; but that does not seem to me either a fatal objection to the construction suggested or the final result of applying that construction.

It is not a fatal objection, for the object of the Act is to discover (*a*) whether compensation is due and, if so, how much, and (*b*) to whom it should be paid. For this purpose it is not necessary that the person lodging the claim and the person receiving the compensation should be identical. Nor is it necessarily the result of so construing the Act that money claimed by X. should go finally and irrevocably to Y. For Y., though the immediate recipient, may well not be the final destinatory of the funds, or of all of them. Section 2, sub-s. 1 of the Landlord and Tenant (Requisitioned Land) Act, 1944, clearly envisages and provides for a case where compensation for damage has been paid to Y., who is not the tenant, yet the tenant incurs expenditure in making good the damage. In such a case the tenant is given a remedy over against the actual recipient of the compensation money. Those and similar provisions in the Act of 1944 seem greatly to mitigate the injustice which at first sight seems to result from Y.'s being

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entitled to reap where X. has sown, Y. being paid compensation which X. has claimed.

For these and the other reasons given by my Lord I agree that the appeal should be dismissed.

EVERSHED M.R. I do not wish to add anything to the observations which have fallen from my brethren, with which I entirely agree.

Appeal dismissed.

Solicitors: *Blount, Petre & Co.; Trower, Still & Keeling.*

B. A. B.

HOUGHTON-LE TOUZEL *v.* MECCA, LD.

1950
Feb. 20.

Birkett J.

Sunday observance—Common informer—Action for penalties—Dance hall open on Sunday—Whether limited company can be liable—Sunday Observance Act, 1781 (21 *Geo.* 3 *c.* 49), *s.* 1.

A limited company is liable to be sued for penalties under s. 1 of the Sunday Observance Act, 1781.

Orpen v. *Haymarket Capitol, Ld.* (1931) 145 L. T. 614 followed.
Attorney-General v. *Walkergate Press Ld.* (1930) 142 L. T. 408 not followed.

ACTION tried by BIRKETT J., with a jury.

A common informer brought this action against Mecca, Ld., claiming a penalty under s. 1 of the Sunday Observance Act, 1781, (1) on the ground that they were the keepers, or joint keepers, of a dance hall at Brighton which was used on Sunday,

(1) Sunday Observance Act, 1781, s. 1: " . . . . any house, " room or other place which shall " be opened or used for public " entertainment or amusement, or " for publicly debating on any " subject whatsoever, upon any " part of the Lord's Day called " Sunday, and to which persons " shall be admitted by the pay- " ment of money, or by tickets " sold for money, shall be deemed " a disorderly house or place; and " the keeper of such house, room " or place, shall forfeit the sum of " 200*l.* for every day that such " house, room or place, shall be " opened or used as aforesaid on " the Lord's Day, to such person " as will sue for the same, and be " otherwise punishable as the law " directs in cases of disorderly " houses."

April 17, 1949, for public dancing, and to which persons were admitted by tickets for which they paid at the entrance.

The case is reported only on the question of the liability of a limited company to penalties under the Act of 1780.

The plaintiff appeared in person.

Salmon K.C., *J. MacMillan* and *Michael Hoare*, for the defendants [making a preliminary submission]. There is no case to go to the jury here, on the ground, amongst others, that a limited company cannot be liable under s. 1 of the Act of 1780. That Act followed the Disorderly Houses Act, 1752, and it would appear from the wording of the Acts that they were directed only against offences committed by individuals.

BIRKETT J. Counsel for the defendants has taken the point that they cannot be liable under s. 1 of the Sunday Observance Act, 1781, because they are a limited company. Counsel argued that a limited company could not come within the ambit of that section because it made the keeper of a house to which it applied punishable as the law directed in cases of disorderly houses.

In *Orpen* v. *Haymarket Capitol, Ld.* (1), a common informer claimed penalties under this Act from a limited company who were the proprietors of a cinema which was open on certain Sundays, and Rowlatt J., in a considered judgment, held that a limited company might be liable under the Act, and that the informer was entitled to succeed against them. In reviewing the whole matter he said (2): " The claim is " made against a limited company who own and manage a " cinema and open it on Sundays, and against four gentlemen " who are directors of that company. It was ultimately " agreed by Sir Patrick Hastings, who appeared for the " company, after he had legitimately thrown every difficulty " which he could in the way of the plaintiff proving her case, " that evidence had been produced that this hall was opened " on Sunday for the exhibition of cinematograph films by the " defendant company. The only substantial point which he " took was that the Act of Parliament does not impose any " penalties upon the company because the word ' person ' in " the Act of Parliament does not in this connexion include " a company. Now everybody agrees that prima facie the " word ' person ' in an Act of Parliament includes that artificial

(1) (1931) 145 L. T. 614. (2) Ibid. 616.

"kind of person which is called a limited company, but there "may be points in the particular statute or in the subject-"matter which show that in a particular case the word 'person' "does not include a limited company."

He went on to say that in his view a limited company might be liable under the Act of 1781, and continued (1): "Therefore, it seems to me that a company is liable under "this Act and that the plaintiff is entitled to succeed against "the company. I should add that, as a matter of fact, in three "cases the penalties under this section have been recovered "against a company. These cases, which were brought "against the Brighton Aquarium when it was a limited com-"pany have been reported, and were cited by Sir Thomas "Inskip in argument, and the point was never taken, although "the defendants in those cases were represented by able "counsel. The point not having been taken the cases are not "authority before me, but they certainly tend to confirm my "view that there is nothing in the objection which is taken."

Horridge J., had, however, the year previously, decided this point the other way in *Attorney-General* v. *Walkergate Press Ld.* (2). There there were informations against a limited company and their directors charging them with having published a scheme for the sale of chances and a lottery under the Lotteries Act, 1823, s. 41. The point in question was the same, and Horridge J. said that the company could not be so sued. That case, apparently, was not cited to Rowlatt J., when he gave his decision.

In 1937 the question arose in *Green* v. *Kursaal (Southend-on-Sea) Estates, Ld.* (3), a case tried before Goddard J. That was an action brought against the defendants in respect of an advertisement in a newspaper issued on August 8, 1936. The advertisement was as follows: "Kursaal Gardens. Amuse-"ment Park and Attractions open daily (including Sundays). "Dancing." A common informer claimed penalties under the Sunday Observance Act, 1781, against the defendants for advertising entertainments on Sundays, they being the printers and publishers of the newspaper. Goddard J. held that they were not advertisers within s. 3 of the Act, but he said (4): "Mr. Roland Burrows takes three points in substance. "First of all, he says, a limited company cannot commit "those offences, because the Act not only provides for penalties

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(1) 145 L.T. 617.

(2) (1930) 142 L. T. 408.

(3) [1937] 1 All E.R. 732.

(4) Ibid. 734.

"but also provides that persons who commit the offences "shall be liable to the other penalties which may be imposed "upon the keepers of disorderly houses. I do not think it "is necessary to give a concluded decision upon this point, "because, in my view, I find the claim fails upon other grounds. "But if I had to give a decision on whether or not a limited "company could commit this offence, I should follow the "decision of Rowlatt J. in *Orpen* v. *Haymarket Capitol, Ld.* (1) "rather than that of Horridge J. in *Attorney-General* v. *Walkergate Press Ld.* (2). It is true that the decision of Horridge J. "does not appear to have been cited to Rowlatt J. but the case "Rowlatt J. decided was a case under the Sunday Observance "Act, whereas the case Horridge J. decided was a case under "the Lotteries Act. Horridge J. in his decision, laid great "stress on the fact that, under the Lotteries Act, a person "promoting a lottery was liable to be treated as a rogue and "vagabond, and I think that was the main ground on which "he held that a limited company could not be a person within "the meaning of the Lotteries Act. Rowlatt J. had "this very Act under consideration, and he thought, "and if I may say so, I respectfully agree with the learned "judge, so far as it is necessary for me to express any opinion "upon it at all, that a limited company could be liable for "penalties under this Act, and that an informer is entitled "to succeed in a claim against a company for the penalties, "although it may be that the limited company could not "be prosecuted further, criminally, for the penalties for "keeping a disorderly house."

The only other case to which I need refer is *Reid* v. *Wilson* (3), where Lord Esher M.R. said: "The jury have found facts "from which it was contended that the house was to be "deemed to be a 'disorderly house' and we have to see "whether, applying the Act strictly to the evidence, Wilson "was the 'keeper' of this house which is deemed to be disorderly. He had been the secretary of a company which "had the power of letting the house. If he had let the house "when he was secretary and when the company were his "masters, though he had actually made the bargain for the "letting, he would not have been the person who let the "house. It would have been the company who let the house, "and the company could not have been sued for penalties "under the Act."

(1) 145 L. T. 614.
(2) 142 L. T. 408.
(3) [1895] 1 Q. B. 315, 320, 321.

Mr. Salmon said that Lord Esher M.R. was there saying that a limited company could not be sued. But quite plainly that was not the main point for decision. Whether, after a full argument addressed to him on that point, the result would have been the same cannot be known, but it is quite impossible to regard it as an authority binding on me on the present point.

I am greatly impressed by the careful judgment of Rowlatt J., in *Orpen* v. *Haymarket Capitol, Ld.* (1). It was a considered judgment, and I find myself in agreement with it. I am influenced very much by the fact that Goddard J., who in *Green* v. *Kursaal (Southend-on-Sea) Estates, Ld.* (2) was deciding a case on another ground, went out of his way to say that, had he been called upon to decide the point now in question, he would have decided it as Rowlatt J. did. I therefore hold that a limited company is within the ambit of s. 1 of the Sunday Observance Act, 1781, and that a common informer in a proper case may sue them for penalties.

Submission overruled.

Solicitors: *H. H. Wells & Sons.*

(1) 145 L. T. 614.

(2) [1937] 1 All E. R. 732.

R. P. C.

1950
Mar. 15, 16.
Devlin J.

KIRIL MISCHEFF, LD. *v.* CONSTANT SMITH & CO.

Arbitration—Error of law on face of award—Power of court to remit arbitration—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 10, *sub-s.* 1.

By a contract in writing dated October 26, 1949, the sellers agreed to sell twenty tons of Turkish walnuts of the 1949 crop, percentage of sound nuts 88 per cent., and it was provided that "Any dispute under this contract to be settled by arbitration "in London. No claims entertained after goods taken from "warehouse." The cargo was landed at the Port of London on December 5, 1949. On January 6, 1950, the buyers wrote to the sellers that on cracking representative samples sent to

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

them from the wharf, they had found approximately 40 per cent. bad nuts, and that they therefore claimed that the delivery was not as per contract. The sellers replied on January 9, 1950, refusing to entertain the claim as out of time in accordance with "common usage of the trade." The parties proceeded to arbitration, and the arbitrators awarded: "In our opinion . . . . "the claim on quality was not made within a reasonable time "from the final date of landing and thereby we conclude that the "buyer has no case."

Held, that the reason, based on the passage of time, given by the arbitrators for their award was inconsistent with the term of the contract barring claims only after removal of the goods from warehouse, and that therefore the award contained an error of law on its face; that an affidavit sworn by a competent person on the question of custom and the correspondence leading up to the reference to arbitration might not be looked at by the court for the purpose of supplementing the award by adding a term to it; that there was no rigid rule of law compelling the setting aside of an award (as against its remission to the arbitrators) because of an error of law on its face, and that the award in question might be remitted because the error of the arbitrators might be merely a failure to set out one necessary step in their reasoning; that, though the affidavit as to custom and the correspondence could not be looked at for the purpose of supplementing the award, they could be looked at for determination of the question whether the court should in its discretion remit the award; and that, as the correspondence preceding the reference showed that the question of custom had been one of the matters referred so that the arbitrators might have reached their conclusion on the basis of a custom though they had not stated it, the award could properly be remitted to them to state whether they found on custom and, if so, what that custom was.

MOTION to set aside an award of arbitrators on the ground of an error of law appearing on its face.

On October 26, 1949, buyers and sellers entered into a contract in writing of which the following were the relevant terms:—

"We have this day sold to you:—

"20 (twenty) tons Turkish natural walnuts F.A.Q. crop "1949 percentage of sound nuts 88%.

"Any dispute under this contract to be settled by arbitration "in London. No claims entertained after goods taken from "warehouse."

The cargo was landed at the Port of London on December 5, 1949. On January 6, 1950, the buyers wrote to the sellers as follows:—"On cracking representative samples sent us "from the wharf, we have found approximately 40% bad nuts, "and therefore, claim that the delivery is not as per contract. "Will you please let us know if you wish jointly to crack "additional quantities, or if you want to refer the matter to "arbitration as per contract."

On January 9, 1950, the sellers replied:—" . . . . we are "sorry and surprised to hear that you find a poor crack, as "our other shipments per the s.s. *Basis* have been found "to be satisfactory. However we must point out that we "cannot accept any claim against these goods at such a late "date. The final landing date of the s.s. *Basis* was "December 5, 1949, and in accordance with common usage "of the trade, claims must be made within the ample time of "14 days from the official date of landing. In fact in some "instances it is taken as 10 days whereas over a month has "now lapsed since this ship finally landed her cargo."

On January 10, 1950, the buyers wrote: "Our contract "with you clearly stipulated 'no claim entertained after "'goods taken from warehouse,' and as you know the total "parcel has not been removed from the wharf where originally "landed. In accordance with our contract we call for "arbitration, for the goods not being 88% sound, and therefore, "not as per contract."

After further correspondence, the parties appointed arbitrators, who on January 16, 1950, published their award which stated " . . . . We consider the claim on quality was "not made within a reasonable time from the final date of "landing and thereby we conclude that the buyer has no case."

On February 20, 1950, the motion was set down for hearing, the sellers to be at liberty to file an affidavit. On March 8, 1950, one Albert Henry Smith in an affidavit stated, among other things, that "It is a custom in the City of London and "of the edible nut trade that it is a condition precedent for "the making of any claims in respect of goods purchased "F.O.B., cost and freight, or C.I.F. terms that the same "should be made within a reasonable time of landing and it "is a further custom as aforesaid that a reasonable time as "aforesaid is in no instance to be longer than 14 days from "the final date of landing of the goods."

E. W. Roskill and *Michael Lee* for the buyers. This award on the face of it contains a decision as a matter of law that the buyers had no case for the reason that their complaint of quality was not made within a reasonable time. That decision is unsound in law, because it is incompatible with the term of the contract: "No claims entertained after goods taken "from warehouse." In all cases where there is an error of law on the face of an award, it must be set aside unless the error is immaterial to the decision.

The affidavit on a custom of the trade cannot be justified. Even if the custom were established, such a custom is so inconsistent with the terms of this contract that it must inevitably be set aside. All questions of custom are questions of implication. It cannot be a necessary implication that this custom must be read into a contract, of which an express term is inconsistent with the custom.

The court is not entitled to look at the correspondence and the sellers' affidavit in order to explain an award which is clear on the face of it. There is no ambiguity on the face of this award and therefore there is no ground for remitting it to the arbitrators. In the last resort it is a matter for the discretion of the court. But the real substance of the buyers' argument is that it would be unprecedented were the court to exercise its discretion and remit an award which is bad in law on the face of it.

Counsel referred to Russell on Arbitration (14th ed.), p. 159, and to *Landauer* v. *Asser* (1) and *Buerger* v. *Barnett* (2).

Maurice Ahern for the sellers. The meaning of this award is in doubt; therefore the court can look at the affidavit. In this case the letters constitute the actual submission, as defined in s. 27 of the Arbitration Act, 1889. A submission has the same effect as if it had been made an order of the court: therefore the letters, as a submission, can be looked at by the court.

Unless a trade custom is in direct conflict with a contract, the custom must be read into the contract. A finding that a trade custom is an implied term of this contract is implicit in the arbitrators' award.

The question of remission to the arbitrators is one for the discretion of the court: Arbitration Act, 1889, s. 10, sub-s. 1 (3) and Russell on Arbitration (14th ed.), pp. 121 et seq. That is so even where an arbitrator is functus officio. Op. cit, p. 137.

(1) [1905] 2 K. B. 184.

(2) (1919) 35 T. L. R. 260; 89 L. J. (K. B.) 161.

(3) Arbitration Act, 1889, s. 10, sub-s. 1: "In all cases of reference "to arbitration the court or a "judge may from time to time "remit the matters referred, or "any of them, to the reconsider- "ation of the arbitrators or "umpire."

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[Counsel also referred to *Hodgkinson* v. *Fernie* (1) and *Odlum* v. *City of Vancouver* (2).]

Roskill replied.

Devlin J. [after stating the facts and reading the award]: It has not been contested that I am entitled to have regard to the contract, which contained the following terms: "Any "dispute under this contract to be settled by arbitration in "London. No claims entertained after goods taken from "warehouse."

Mr. Roskill contends that this award on the face of it contains a legal proposition, namely, that the buyers had no case in law because the claim on quality was not made within a reasonable time from the date of landing. He further contends that the reason which the arbitrators gave—that the claim on quality was out of time—is the only reason by which they seek to justify their conclusion. That that reason, he says, is plainly unsound in law appears from the contract, because the contract provides that no claim shall be entertained once the goods have been taken from the warehouse.

The fact that there is an error of law on the face of this document is not seriously challenged; but Mr. Ahern argues that, in considering whether the award contains an error of law, I am not limited to the award and the contract, but that I can look at certain other documents set out in an affidavit and consisting of correspondence between the parties leading up to the reference. It is clear that such documents could not be looked at in order to impeach the award, or to see if any erroneous conclusion of law was reached by the arbitrators. But the position may be different when documents are looked at in order to assist the award. The authorities do not seem to decide the point one way or the other. In Russell on Arbitration (14th ed.), p. 187, there is a reference to the only case, *In re Marshall and Dresser* (3) raising the question of an affidavit, and it is inconclusive. Mr. Ahern also contends that if I cannot look at the affidavit I can look at the correspondence, on the ground that the letters contain the submission in the case.

It is unnecessary for me to decide whether I can look at these documents for the purpose of construing some provision in the award or of resolving some ambiguity in it. What

(1) (1857) 3 C. B. (N. S.) 189.
(2) (1916) 85 L. J. (P. C.) 95.
(3) (1842) 3 Q. B. 878.

I am quite clear about is that I cannot, as Mr. Ahern would like me to do, extract something from them and insert it as a term into the award. The court has no power to do that. Accordingly, in my opinion, this motion succeeds to the extent that Mr. Roskill has satisfied me that the award is bad.

I next have to consider whether to set aside this award, or to remit it to the arbitrators. In all the numerous cases in which awards have been sent back the award itself has been ambiguous and uncertain, and, by sending it back, the ambiguity could be cured. What, I think, is novel about the present case is that this. The award itself contains nothing which is uncertain; the conclusion is clear; the buyers have no case. But the arbitrators have done something which they were under no obligation to do, that is, to give a reason for their decision. The question is whether in these circumstances the award can properly be sent back to them. No authority has been cited to me directly on the point, and Mr. Roskill says that it would be unprecedented if it were remitted.

It seems to me that I ought to consider first what is the error of law which the arbitrators have made. One possible view is that they have completely failed to understand a clear and simple contractual provision in the sort of document with which they spend the whole of their commercial lives. Another possible view is that they have a good reason for what they did but have omitted some essential step in their reasoning. I am quite unable to hold that in these latter circumstances, should they exist, there is any rigid rule that, because there is an error of law on the face of an award, it should never go back. As a matter of general principle, if an award contains defective reasoning, and the defect may be due not to an error of law, but to an omission to set out some step in the arbitrators' reasoning, I think it not improper to send it back for the cure of that defect of reasoning. It is true that the arbitrators are not obliged to give any reason for their decision: but if they have done so, and it appears to be defective, I cannot see why they should not be given an opportunity of curing that defect.

This is the view at which I have arrived after I have looked simply at the award itself. I think that it is consistent with the general principles that have been laid down in these matters. [His Lordship read s. 10 of the Arbitration Act, 1889, and continued]: It is worth referring to *Hodgkinson* v. *Fernie* (1) where Cockburn C.J.

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(1) 3 C. B. (N. S.) 189, 201.

after referring to s. 8 of the Common Law Procedure Act, 1854, which contains the provisions now embodied in the Act of 1889, said: "I am, however, clearly of opinion that it "was not intended by that enactment to alter the general "law as to the principles upon which the courts had been in "the habit of acting in determining whether they would or "would not set aside awards; but merely to give the court "power to remit the matter to the arbitrator for reconsidera-"tion in all cases, though the submission should not contain "that extremely useful clause giving them that power, where it "turned out that there was a fatal defect in the award, but "of such a nature as not to render it expedient to set aside "the award, and thus render nugatory all the expense that "had been incurred under the reference."

In all these matters that is the determining consideration with regard to the use of discretion by the court: the court should have in mind the fact that the parties have chosen this form of tribunal and the arbitrators, and, if it is avoidable, they are not to be put to the expense of starting de novo. I should qualify that general statement by saying that an award should be remitted only if that can be done with justice to the parties. This is a matter which requires consideration here because of the rather unusual nature of the defect in this case. If the award were to be sent back for reconsideration generally, with complete liberty to amend, the arbitrators might simply strike out their reason, in which case the award could not be successfully attacked. The court cannot permit that to be done. The arbitrators having given a reason, I think that a party who desires to do so ought to be able to show the court on the face of the award what moved the arbitrators to reach the decision which they did.

Although I have held that I am not entitled to look at the affidavit or correspondence to supplement the award, I think that I can and should do so in order to determine how to exercise my discretion, and in what way it should be exercised. In *Odlum* v. *City of Vancouver* (1) Lord Dunedin, giving the opinion of the Privy Council, said: "There remains the "question of whether it" [the award] "should be set aside "or remitted for reconsideration. This seems to their Lord-"ships a question for discretion for the judges in the whole "circumstances of the case, and unless that discretion has been "obviously misused they do not feel inclined to interfere "with it."

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(1) 85 L. J. (P. C.) 95, 98.

I think therefore that I can properly look at these letters, and it then becomes plain that primarily two things were referred to the arbitrators. It is clear that the buyers made a complaint of quality, and equally clear that the answer to them appears to be that the claim was out of time. [His Lordship then read extracts from the letters of January 6, 1950, and January 9, 1950, and continued :] It is therefore clear that one of the matters on which the arbitrators were asked to decide was whether there was a custom in those terms or not, and that suggests that they may have reached their conclusion on the ground that they found such a custom and that they considered it consistent with the contract.

In those circumstances I think it right that, instead of sending the award back generally, I should remit it to the arbitrators for further consideration of one of the matters referred to them, that matter being the question whether or not there was a custom in the terms contended for by the sellers.

I therefore make an order that this matter should be referred back to the arbitrators for further consideration and that they should make a specific award stating whether they find a custom, and if so, what that custom is. When the arbitrators have done that, their finding can be added to the existing award, and it will then be possible for the court to give consideration to the motion to set aside. It is clear that, even if the arbitrators do find such a custom, it is not necessarily the end of the matter. The question of law will then arise whether the custom is consistent with the contract ; but it is desirable that this point should be argued on whatever custom the arbitrators find proved.

Award remitted

Solicitors : *William A. Crump & Son ; Stannard, Bosanquet & Michaelson.*

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3. —— *Ship repairs — Not to be carried out " except under the authority of a licence " granted by the Admiralty " — Oral permission sufficient—Restriction of Repairs of Ships Order,* 1940 (*St. R. & O.* 1940, *No.* 142), *para.* 1—*Assumption of authority by Government officer—Whether subject protected if authority exceeded.*
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